

DELHI UNIVERSITY
LIBRARY

G1 E
DELHI UNIVERSITY LIBRARY
Cl. No. Z-fb
Ac. No. 104620
Date of release for loan
This book should be returned on or before the date last stamped below An overdue charge of 06 nP. will be charged for each day the book is kept overtime.

The first volume of this Edition of "*A Panorama of the World's Legal Systems*" by John H. Wigmore, has been autographed by the author.

A Panorama of the World's Legal Systems



A PANORAMA OF THE WORLD'S LEGAL SYSTEMS

A PANORAMA

of the

WORLD'S LEGAL SYSTEMS

by

JOHN HENRY WIGMORE

Professor of Law in Northwestern University

IN THREE VOLUMES
WITH FIVE HUNDRED ILLUSTRATIONS

VOLUME I

SAINT PAUL
WEST PUBLISHING COMPANY

Copyright 1928
by
John H. Wigmore

To

THE BRETHREN OF THE BAR

OF THE

UNITED STATES OF AMERICA

IN THE HOPE THAT THROUGH THEIR LEADERSHIP

THIS NATION MAY ATTAIN TO

A LARGER KNOWLEDGE AND A DEEPER INTEREST

IN THE

LEGAL INSTITUTIONS OF OTHER PEOPLES

AND

THUS MAY BE INSPIRED

TO A MORE READY COÖPERATION

IN ALL THAT MAKES FOR

THE WORLD'S LEGAL PROGRESS

Author's Note

Purpose. The purpose of these chapters is to interest the professional public (lawyers, and students of law and political science) in the world's legal systems outside our own. This is perhaps the first attempt to apply in the field of Comparative Law the method now so widely used in expounding other branches of knowledge—the pictorial method. Who would have thought that the dry history of Law could be enlivened with pictures? That it can be done, the author has proved, to his own satisfaction at least, by a series of lectures with lantern-pictures, covering the same field, and delivered during the last four years to successive classes of law students, as well as to several thousand lawyers in cities from Massachusetts to California.

This book seeks to give permanent form to the method, by aid of the printed page.

Scope. The sixteen principal legal systems, past and present, form the subject—Egyptian, Mesopotamian, Hebrew, Chinese, Hindu, Greek, Roman, Japanese, Mohammedan, Keltic, Slavic, Germanic, Maritime, Ecclesiastical, Romanesque, Anglican.

For each series are shown between twenty and fifty pictures, connected by a concise narrative exposition. In each series, the pictures present the *edifices* in which Law and Justice were dispensed (whether temples, palaces, tents, courthouses, or city-gates); the principal *men of law* (whether kings, priests, legislators, judges, jurists, or advocates); and the chief types of *legal records* (whether codes, statutes, deeds, contracts, treatises, or judicial decisions). By these aids, the narrative attempts to reconstruct some realistic impressions of the legal life of these peoples. Subsequent study of the book-learning about the details of these systems can thus be made more attractive and intelligible.

Pictures. The pictures have been gathered by the author, during many years past, by search in libraries and by travel in

numerous countries. Some of the photographs were taken specially for this purpose. For example, in the Roman and the Greek series, photographs were taken of the earliest records preserved in the museums of Naples and Rome; in the Canon law series, of manuscripts in the Vatican library; in the Babylonian series, of boundary-records in the British Museum; in the Japanese series, of early deeds in the Imperial Museum at Nara; in the Slavic series, of early Bohemian codes at Prag; in the Romanesque series, of the ancient courtroom of Normandy at Rouen; in the Maritime series, of the Consulado del Mar at Paris; in the Mohammedan series, of the oldest extant law-treatise at Milan and of the longest deed in the world at Cairo. From various galleries of Art have been used photographs of famous paintings, such as Titian's painting of the Council of Trent, Ary Scheffer's painting of Charlemagne enacting his First Statute, and Cabanel's painting of St. Louis dispensing Justice, at Paris; of Benjamin Constant's painting of Justinian Compiling his Code, in the Metropolitan Art Museum of New York; of Serra's fresco of Irnerius, at Bologna.

The facsimiles of manuscripts and inscriptions, from the archaeological and historical records of various countries, include the oldest court record, the oldest will, the oldest treaty, the oldest codes, extant in the world; Gaius' Institutes and Justinian's Digest; the Lex Salica and the Sachsenspiegel; Domesday Book and Bracton's De Legibus Angliae; Gratian's Decretum, one of Innocent III's Bulls; the earliest Islamic law-treatise, and the oldest Roman civil judgment; typical deeds and contracts in the Egyptian, Hebrew, Germanic, Roman, Hindu, Islamic, and other systems.

The printed facsimiles include the first editions of the Code Napoleon, of Coke's Institutes, etc., etc.

The views of buildings and places are taken, for the ancient systems, exclusively from archaeologists' or artists' restorations (not ruins), and are colored in pursuance to authentic directions. For the modern systems, they include the famous edifices of Justice in Rome, Paris, London, Rouen, Padua, Moscow, Budapest, Calcutta, Peking, Buenos Aires, Cairo, Morocco, Bokhara, Constantinople, and elsewhere.

The portraits (ideal or veritable) include the most famous judges, jurists, advocates, and legislators in all the systems, so far as obtainable.

Eight libraries in Chicago have been searched personally by the author; acknowledgments are here due to the Librarians of the University Library of Northwestern University, the Garrett Biblical Institute Library, the Evanston Public Library, the Chicago Public Library, the Newberry Library, the John Crerar Library, the Chicago Art Institute Library, and the University Club of Chicago Library. Most of the books of law used and of the portraits and facsimiles selected have been found in the Elbert H. Gary Law Library of Northwestern University. Many libraries and museums elsewhere have been consulted by correspondence,—in particular, the Frick Art Reference Library in New York, Sir Robert Witt's Art Reference Library in London, the Libraries of Congress, of the Fiske Collection of Cornell University, and of the Haskell Oriental Institute of the University of Chicago. Books of travel, history, and memoirs have been drawn upon. To the scores of publishers, authors, editors, librarians, professors, and personal friends who have procured or donated illustrations or freely consented to their use, a grateful acknowledgment is now made; their names in each case are listed at the end of each chapter.

The photographs not obtained from abroad were made under the author's direction, by Mr. C. T. E. Schultze of Chicago. The photo-engraving was done by the Buckbee-Mears Company of St. Paul.

Text. Specialists in these varied branches may find reason, here and there, to question a statement in the text. As to this, the range covered is extensive, and the whole field abounds in details yet undiscovered or unsettled by historical scholarship; so that the author cannot hope to have avoided matters of controversy. But he has sought at every point to depend for the facts upon respectable authority; and chapter and verse can be given in every instance. Wherever available, the original record, or a facsimile, has been used and shown. For the broad outlines, and the generalizations, the author accepts responsibility. The periods of time being large,

exact dates would often make a false impression; hence, round numbers only have generally been given.

Moreover, the object has been, not to establish specific facts for the scientific world, but to present in perspective for the legal profession (and the general public) a true impressionistic whole. The plan was as attractive (and as venturesome) as that of Mr. H. G. Wells' "Outline of History"; and the difficulties and limitations have been similar. Naturally, the method of drawing an impressionistic picture, in broad outlines, compels often the omission of those exceptions and qualifications which would otherwise have to be stated. Each method—the impressionistic and the microscopic, that of Monet and that of Meissonier—has its own legitimate place as a vehicle of Truth.

References. No footnotes are used. But at the end of each chapter are cited (1) the sources of the illustrations used, with acknowledgments to publishers and authors; (2) the sources of the documents quoted; (3) some general works of reference.

This list of General References is intended to aid those readers who may be stimulated to study further any one of the legal systems here described. Only works in the English language are listed, except where such works are scanty in scope or the materials in some other language are indispensable.

For a general background to the whole comparative history of law, the author ventures to recommend the following reading-list of works in the English Language:

Sir *Henry Sumner Maine*, "Ancient Law" and "Early Institutions" (latest editions);

John Maxcy Zane, "The Story of Law" (New York, Ives Washburn, 1927);

Albert Kocourek and *John H. Wigmore*, editors, Evolution of Law Series (Boston: Little, Brown & Co.); a compilation from the world's legal literature;

Vol. I: "Sources of Ancient and Primitive Law";

Vol. II: "Primitive and Ancient Legal Institutions";

Vol. III: "Formative Influences of Legal Development".

Continental Legal History Series (Boston: Little, Brown & Co.), Vol. I, "General Survey", and Vol. XI, "Progress of Continental Law in the Nineteenth Century".

Many years ago, while living in Japan, the author came under the spell of what is called Comparative Law. The world-wide stimulus of Maine's "Ancient Law" was then unique; there was little knowledge, few workers, and scanty materials. Times have moved on. The field of Comparative Law, as known to scholars, has been vastly enlarged; and every country now has its specialist contributors. The trend of the times urges to greater and more intelligent interest by the peoples of the world in each other; and Maine's inspiring call to that knowledge still echoes to our profession. But the legal profession at large has not hitherto been vouchsafed an opportunity to share this knowledge, summarized in feasible form and with living interest. The present work seeks to offer that opportunity.

Northwestern University School of Law
October, 1928

A Panorama of the World's Legal Systems

CONTENTS

VOLUME ONE

PROLOGUE Page

Purpose of the Panorama—The legal systems compared, as to Age and Duration 3

CHAPTER I.

THE EGYPTIAN LEGAL SYSTEM

1. Egypt and the Nile Valley—The earliest legal system. 11
2. The king the fountain of justice—The chief judge and prime minister—The courts 12
3. Maat, the goddess of justice—Egyptian philosophy of justice—Harmhab's search for the perfect judges—Thutmose's instructions to his chief judge 13
4. The king as legislator—Menes, the first law-giver—Harmhab, the legislator-king—The lost codes. . . . 17
5. Transactional documents—Pictographs—Ramses II's treaty with the Hittites—Hieratic script—Uah's will—Demotic script—Bond for release of a prisoner—Marriage-contract—Greek script—Roman decision in Greek. 18
6. Judicial procedure—Oldest court record—Lawsuit of Mes v. Khay—Rules for procedure—Trial for treason—Trial for tomb-robbing. 30
7. Papyrus of Hunefer—Judgment of the Soul. 47

8. Egyptian system submerged under Greek and Roman and Mohammedan rule Page 49

CHAPTER II.

The Mesopotamian Legal System

1. Babylonia and Assyria—Their mixed stocks 59
2. Development of literature and commerce—Cuneiform records of commerce and law 60
3. Deed of storehouse—Warranty deed—Stone landmark—Marriage-settlement 63
4. Commercial instruments—Promissory note payable to bearer—Banking records—Partnership documents . . . 69
5. Judicial system—Judgment in a boundary-suit—Action for the sale-price of land—Lawsuit over a will—Action by a widow claiming land—Petition of an accused under arrest 73
6. Sumerian code—Parable of the prodigal son—Hammurabi code—Codes of Hammurabi, Assur, and Deuteronomy, compared 84
7. Daniel and the handwriting on the wall—Fall of Babylon 92

CHAPTER III.

The Hebrew Legal System

Shifting home of early Hebrews—Five stages of the legal system 103
1. *Mosaic Period*—The Ten Commandments—Hebrew and Greek texts—Deuteronomy—Moses delegates justice to professional judges—Solomon—Absalom doing justice at the Gate—Solomon's judgment between the two mothers 105
2. *Classic Period*—The Sanhedrin—The rabbi—The Temple—Loss of Hebrew political independence . . . 112
3. *Talmudic Period*—The Talmud—Development of law by precedents—Debates of the rabbi—Jesus debating in the Temple 117

4. *Medieval Period*—Maimonides—Exchequer of the Jews —Commercial instruments—Marriage-contracts . . . Page 123
5. *Modern Period*—A Hebrew Code—Reading the Torah. 130

CHAPTER IV.

THE CHINESE LEGAL SYSTEM

(*I*) *Political Principles*

1. The third oldest system, and the only surviving old one —Conservatism and filial piety—Confucius' political philosophy 141
2. Philosophy of Justice 143
3. A government of men, not laws—Absolute governors, responsible for producing popular contentment. . . . 145
4. Conciliation before litigation 148
5. Legislation based on popular custom and sentiment. . 150
6. Laws penal in form 152
7. Practical justice; the testimony of Perera the Portuguese 153

(*II*) *The Old Legal System*

8. Early codes—The "Burning of the Books"—Tsing Code of A. D. 1650—Lu and Li—Texts on Adoption and on Mortgage 158
9. Conveyancing—Mortgage deed of 1870—Registration of land-titles 169
10. Court procedure 177
11. Appellate justice—Precedents—Supreme Court opinions of A. D. 1827 and 1830 on adoption and marriage— Record of a trial for manslaughter in A. D. 1808 . . . 178
12. Law-treatises — Imperial edicts — Judicial rescript — Legislative decree—Edict on stone 187

(*III*) *The New Legal System*

13. Revolution of 1912—Constitution of 1923—New codes —New Supreme Court decisions 193
14. Durability of China's institutions. 200

CHAPTER V.

THE HINDU LEGAL SYSTEM

(*I*) *Races and Languages in India*

1. Heterogeneous peoples and law languages—Six successive alien dominations—Mohammedan element—Native Hindu law Page 211

2. Sanskrit and Pali—Records on palm-leaf and stone—Deeds of B. C. 23 and A. D. 1000—Jagannatha's rules for conveyancing 215

(*II*) *The Buddhist Branch*

3. Buddhist law—Asoka's edicts 224

4. Buddhist law in Indo-China, the East Indies, and the Philippines 227

5. Burmese law—Dhammathat—Court procedure. . . . 228

6. Siamese law—A trial for treason in Siam. 236

7. Eradication of Buddhism in India. 242

(*III*) *The Brahman Branch*

8. Brahman Laws of Manu—Caste—Village justice—Schools of Brahman law—Jagannatha on the law of gifts 243

9. Courts of the rajahs—The Durbar—Brahman legal advisers—Rules of pleading—Procedure by taboo . . . 249

10. Administration of justice—Bribery and perjury. . . . 257

11. Brahman law submerged by the Mohammedan conquests—Revived under British rule 266

12. Sanskrit discovered and the law-books translated—Custom vs. scholastic books—Hindu law in British courts. 270

Page

Prologue to Chapter VI 283

CHAPTER VI.

THE GREEK LEGAL SYSTEM

1. Greece in the Homeric Period—The Lawsuit on Achilles' Shield—Themis—Greek justice not theocratic, but democratic. 287
2. Classical period—Tribunals of jurors as judges—Juries of 500 persons—Socrates' trial 289
3. Aristotle's description of the drawing of the jury—Conduct of the trial—Juries the all-powerful judges of law and of fact—Mock-trial of Lucian. 293
4. Civil litigation—Record of the lawsuit of Pausimachos' Heirs v. Calymna City 314
5. Places of trial—Phidias' trial in the market-place—Trial of Orestes on the Areopagus 318
6. Jury-trial and forensic oratory—Lysias, the speech-writer—Hyperides and the trial of Phryne—Demosthenes' speech in the case of Darius v. Dionysodorus—Demosthenes' speech on the Crown 324
7. Legislation—Minos the first law-giver—City-laws of Gortyna—Solon the legislator—Legislative methods. . 335
8. Conveyancing—Deed, Lease, Loan—Drainage contract 346
9. Greek Art and Literature in contrast to Greek Legal Science 358

CHAPTER VII.

THE ROMAN LEGAL SYSTEM

1. Roman instinct for law and order—Territorial expansion 373

(I) Period of the Republic

2. The Twelve Tables—Public inscription of laws—City ordinance for highway regulation, B. C. 45—Colonial city ordinance for court-procedure Page 374

3. Earliest civil judgment, in a boundary suit. 384

4. Transactional instruments—Contract to build a gateway, B. C. 105—Deed from Dacia—Testament from Egypt 389

5. Lay tribunals—The advocate—Tacitus on the status of advocates—Hortensius—Cicero—Essay on argumentation 396

6. The court-houses—Jury trials 406

(II) Period of the Early Empire

7. The praetor—Trial methods—Trial of Apollonius at Rome—The sophists' trial at Athens—Jesus' trial at Jerusalem 408

8. Development of a science of law. 419

9. Julian, the judge—The Perpetual Edict—Records of decisions. 420

10. Ulpian and Papinian, the Counsellors—Opinion rendered by a counsellor—Case-law 426

11. Quintilian, the teacher—Treatise on the Education of the Advocate 434

12. Gaius, the jurist—The Institutes—Dawn of legal science 437

(III) Period of the Later Empire

13. Justinian at Byzantium—Compilation of the Digest. . 443

14. Italy occupied by the Germanic tribes—Disappearance of Roman Law in the West 446

VOLUME TWO

Page

Prologue to Chapter VIII 457

CHAPTER VIII.

THE JAPANESE LEGAL SYSTEM

(*I*) *First Period, A. D. 500-1200*

1. Immigrant races 461
2. Laws of Shotoku Taishi—Confucian morality the basis 463
3. Later codes—Early conveyancing—Rule of the palace intellectuals—The Fujiwara family—Transfer of power to the military barons 465

(*II*) *Second Period, A. D. 1200-1600*

4. Yoritomo, founder of the feudal Regency. 475
5. Code of Jo-yei—The Supreme Court. 476
6. Civil War again 479

(*III*) *Third Period, A. D. 1600-1850*

7. The Tokugawa dynasty, and Iyeyasu the founder—Three centuries of peace—Commercial development. . 480
8. Legal development under the Supreme Court. 481
9. Laws not published—Handbooks of instruction for magistrates—Trial methods—Oka the famous judge—Local village codes 483
10. Conciliation before litigation—Parties' settlement record of A. D. 1853 489
11. Development of law by judicial precedents—The three jurisdictions—The Supreme Court—Rules of procedure—Revision by reference from the trial judge—Record of a partnership lawsuit—Use of precedents—Supreme Court opinion on survival of liability. 503

(*IV*) *Fourth Period, A. D. 1850+*

12. Political changes—New Codes and Old Customs . . . 520

CHAPTER IX.

THE MOHAMMEDAN LEGAL SYSTEM

(*I*) *Origin and Spread of Islam*

Arabia awakened by Mohammed—Islam an all-inclusive system of life—Spread of Islam—Leadership in science and arts—Cordoba the finest capital in Europe —Decline of Islam—Stages of its legal history. . . . Page 535

(*II*) *Civil Justice*

1. Law a part of religion—Sources 543
2. The Koran. 545
3. Sayings and Acts of Mohammed—Sayings on the law of succession 548
4. The commentators—Zaid Ibn Ali—Sidi Khalil's Code on sales, bankruptcy, partnership—Opinions on legal cases—Theoretic treatises 552
5. Conveyancing — Deed of trust — Inheritance — The longest deed in the world 565
6. Development of a professional class—Shaikh-ul-Islam 573
7. Mufti and Kadi — Judge and Counsellor—Divorce-suit in modern Tunis 578
8. Legal Education—Harun-ar-Rashid—Colleges 587
9. Example of a lawsuit-record in A. D. 1916 591

(*III*) *Criminal Justice*

10. The Divan, or personal justice of the ruler. 614
11. Justice in Arabia—Judge in Libya—Courts in Nigeria —The Sultan of Ruanda—Justice in Annam, Persia, Afghanistan 620
12. Modern Turkey and Persia—Occidentalization of the law—Conservation of racial ideas. 636

(*IV*) *Retrospect*

Prologue to Chapters X, XI, XII.

The three illiterate European races, Keltic, Slavic, Germanic—Effects of the gradual contact with the literate Mediterranean races Page 653

CHAPTER X.

THE KELTIC LEGAL SYSTEM

(I) First Period: Keltic Independence

1. Conquest of Gaul by Julius Caesar. 657
2. Two types of Kelts—Political instability—Survival of legal system in Wales and Ireland. 659
3. Druids as judges and repositories of the unwritten law—Carnac monuments—Druid justice 661
4. Extirpation of the Druids 668

(II) Second Period: The Surviving Keltic Systems

5. Stages of Irish legal history 669
6. Primitive conditions 671
7. King Cormac the legislator—The Assembly at Tara. . 673
8. Judgments of the Brehons—The "Wrong Judgments" of Caratnia. 676
9. St. Pathric brings letters—The customs recorded. . . 686
10. Irish leadership in literature and learning. 689
11. The Irish law-books—The Senchus Mor—Law of distress, and of damage by pigs—Script of the law-books 690
12. The Welsh law-books—Code of Howel the Good—The triads 699
13. Contrast between Keltic and English legal ideas—James Lynch's Case 704

(III) Third Period: Dissolution of the Keltic System

14. Llewellyn the Great—Magna Carta saves Welsh law—Henry VIII extirpates it. Page 707
15. Irish law abolished by James I—Causes for its overthrow—The Curse of Tara. 713
16. Daniel O'Connell and the Repeal—The Irish Free State and the Irish Chief Court of 1924. 718

CHAPTER XI.

THE SLAVIC LEGAL SYSTEM

1. Four main branches of the Slavic race 735

(I) Bohemia

2. The Checks—Judgment of Libussa, the maiden ruler . 736
3. Germanic mercantile towns—Brünn Book of Rights—Court record of Brünn 738
4. The Jus Regale Montanorum—Charles IV and his imported Romanesque jurists—Majestas Carolina. . 741
5. Budovec, the patriot chief justice—The Defenestration—Suppression of Bohemian law 744

(II) Poland

6. Kasimir the Great's Charter of Wislica—Romanesque law—Court record of Krakow—Germanic mercantile law 746
7. Constitution of Nieszawa—Poland an oligarchy—The Liberum Veto—Konarski the jurist. 750
8. Partition of Poland—Code Napoleon and Russian law 753

(III) Yugoslavia

9. Greek Christianity—Shepherds and mountaineers. . . 754
10. Romanesque law from Byzantium and Venice—Law-code of Spalato—Glagolite script and the law-code of Verbenik—Serbian code of Stefan Dushan. 755
11. Mohammedan and Austrian law in the Balkans. . . . 763

(*IV*) *Russia*

Page

12. Four periods in Russian legal history 765
13. Early Germanic rulers—Greek church law from Byzantium—Code of Yaroslav the Just 768
14. Centralized feudalism—Ivan the Terrible and his bloodthirsty rule 772
15. Trial methods in the 1500's 779
16. Tsar Alexis and Chancellor Nashchokin—Bureaucracy—Peter the Great—Futile code-commissions—Catherine's code plans 785
17. Emperor Nicholas I and Chancellor Speransky—The Svod Zakonof code—Reforms of judiciary organization 794
18. Revolution of 1917—Soviet codes and justice 797

CHAPTER XII.

THE GERMANIC LEGAL SYSTEM

(*I*) *First Period*

1. Odin and Valhalla—Predatory conquest, the Vikings' vocation 813
2. Germanic justice secular, not priestly, and democratic, not monarchic—The Ting, and the Hill of Laws, in Iceland—Law-men and law-speakers—Procedure . . . 814
3. The lawsuit in Njal's Saga—The deemster in the Isle of Man 818
4. Four periods of Germanic law 829

(*II*) *Second Period*

5. Migrations from Northern and Eastern into Western and Southern Europe—Law "personal" and written . . 831
6. Code of the Salic Franks—Edict of the Lombards—Visigothic Code—Scandinavian Codes 835
7. Charlemagne the legislator 839

(*III*) *Third Period*

8. Law becomes territorial 839

3. The first law school—Government by students—Records of the law-student guilds Page 986
4. Eminent status of the law-professor—The glossators . 991

(*II*) *Adaptation of Roman Law*

5. The practicians—Opinions on cases—Bartolus. . . . 994
6. New court-houses in Italy and France—Palais de Justice at Paris. 999
7. Spread of Roman law studies—Bracton and Azzo. . . 1,007
8. Shift of leadership from Italy—Cujas in France. . . . 1,009
9. Netherlands and Scotland 1,012
10. Germany — Reception of Roman Law — Carpzov — Windscheid and Von Ihering. 1,015

(*III*) *Nationalization of Roman Law*

11. Roman law as a secondary law only, alongside of local law 1,021
12. The nationalizers, Dumoulin, Colbert, Pothier, in France 1,022
13. Code Napoleon—Nationalization in other countries. . 1,027

(*IV*) *Expansion of Romanesque Law*

14. Scientific and political motives—Spread of Romanesque law to other continents 1,033

CHAPTER XVI.

THE ANGLICAN LEGAL SYSTEM

(*I*) *Building a Common Law*

1. Diverse racial and feudal elements 1,054
2. Unification—Insular location—William I, Henry II, Edward I—Domesday Book—Westminster Hall . . . 1,054
3. Instinct for law and order—Bracton—Guilds of lawyers —Inns of Court—Year-Books 1,058

(*II*) *Rejecting the Romanesque Law*

4. Legal patriotism—Littleton, Fortescue, and Coke. . . 1,077
5. A strong legal profession—Inns of Court. 1,080

(*III*) *Cosmopolitanization and Expansion* Page

6. Crudity of the 1400's 1,090
7. Science and learning of the 1600's—Coke, Bacon, and Selden. 1,091
8. Commercial and colonial expansion—Mansfield and Blackstone. 1,094
9. Anglican law belting the globe—The American Bar Association in London, 1924—Role of a professional class in maintaining a legal system. 1,098

CHAPTER XVII.

EPILOGUE: THE EVOLUTION OF LEGAL SYSTEMS

Legal systems as a whole, in contrast to specific legal ideas or institutions—General survey of the conception 1,119

(I) Comparative Law, in general. 1,120

(II) Comparative Legal Institutions 1,121

(III) Comparative Legal Genealogy, or Corporealogy. . . 1,122

1. Corporeal method in comparative law. 1,123
2. Limited number of legal systems, or bodies. 1,125
3. Problems peculiar to legal systems 1,126
4. Causes of the creation, survival, or disappearance of a legal system 1,127
5. Existence of a trained professional class, as necessary to a legal system 1,129

APPENDIX

A World-Map of Present-Day Legal Systems 1,133

List of Illustrations 1,147

Index 1,163

A Panorama of the World's Legal Systems

ONE PICTURE IS WORTH TEN THOUSAND WORDS.

Old Chinese Proverb

ALL HISTORIES SEPARATED FROM THEIR LIVING DOCUMENTS ARE EMPTY NARRATIVES. AND, SINCE THEY ARE EMPTY, THEY FALL SHORT OF THE TRUTH.

Benedetto Croce

"History, Its Theory and Practice", p. 17 (1921)

Prologue

IN these days, more potently than ever, the peoples of the world find themselves drawn together towards better mutual understanding. The science of Law, too, is having its share in this grand phenomenon. But, for the wise understanding of the present, a clear knowledge of the past is necessary. Yet the past is gone from sight. Can it ever be reconstructed, so that we may understand better the spirit and the atmosphere in which disputes were settled, laws were debated, codes enacted, and justice dispensed?

If we are ever to interpret fully the cold written records of the world's legal systems, other than our own of today, must we not first seek to restore, in the mind's eye, the environment in which the several peoples lived and moved and had their being, and the setting of the distinctive events and traits in the history of their law? May we not, by pictures, give life and reality to the narrative? May we not take a temporary flight above the earth, look down upon the globe, and there watch the Panorama of the World's Legal Systems unroll before us, from the earliest past down to the present day?

Such is the purpose of the ensuing chapters.

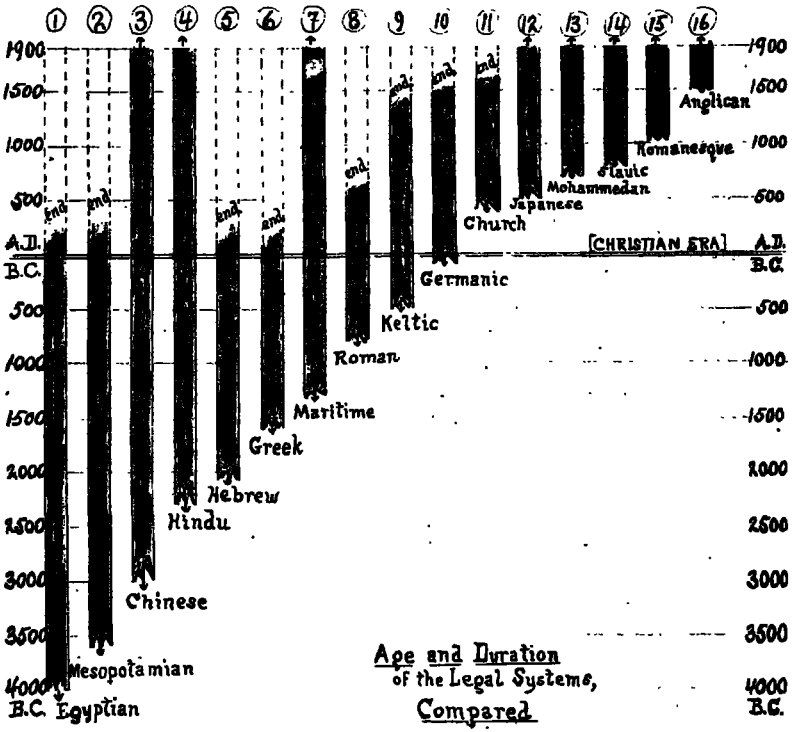
But what were, or are, those legal systems? Not many. They can be reduced to a few, in all. That is,

amidst the vast and changing welter of local customs, scattered rules, and casual decrees, which every tribe and people has devised for its daily life, throughout all times and places in the world's history, there emerge only a few peoples who have developed a well-defined, organized, continuous body of legal ideas and methods, reaching the dignity and solidarity of a legal system. These alone will occupy our attention.

Arranging them broadly in order of time—that is, the dates of their respective beginnings in historical times—the systems are these: Egyptian, Mesopotamian, Chinese, Hindu, Hebrew, Greek, Maritime, Roman, Keltic, Germanic, Church, Japanese, Mohammedan, Slavic, Romanesque, Anglican,—sixteen in all. By a chart one may gain a general conception of the relative age and endurance of the sixteen systems here to be described. The periods indicated on the chart for beginnings signify merely an approximate or tangible date; the beginnings were no doubt in all instances somewhat earlier.[1]

Some of these systems are gone; some remain. The Anglican, the Romanesque, and the Mohammedan, which are among the most youthful, today cover the greater part of the world's population. The Egyptian and the Mesopotamian, the oldest, have long disappeared. The Hindu

survives by tolerance under another dominant political system. Of the oldest, the Chinese alone survives in independence.



1. Prologue: Age and Duration of the Legal Systems, Compared

In the ensuing chapters, this sequence of the systems in their times of origin will not be strictly observed. The Hebrew system, though not so old as the Chinese, will

naturally follow the Mesopotamian, in the narrative. And the story of Europe's law, since the Christian era, can best be told by describing first the Keltic, Slavic, and Germanic systems, and then turning back to the beginnings of the Maritime and Church systems, whose records far antedate those of the other three.

How shall we then, with the aid of pictures, seek to restore, to the mind's eye, the environment in which these various systems have developed during the last six thousand years?

In each one, let us recall to the eye the *edifices* in which they dispensed law and justice (whether temples, palaces, tents, courthouses, or city-gates); their principal *men of law* (whether kings, priests, legislators, judges, jurists, or advocates); and their chief types of *legal records* (whether codes, statutes, deeds, contracts, treatises, or judicial decisions). We may thus hope to reconstruct more vividly some principal impressions of their legal life, to understand more clearly their spirit, and to perceive better the contrasts between their distinctive traits and their several fates.

And first, the EGYPTIAN LEGAL SYSTEM:

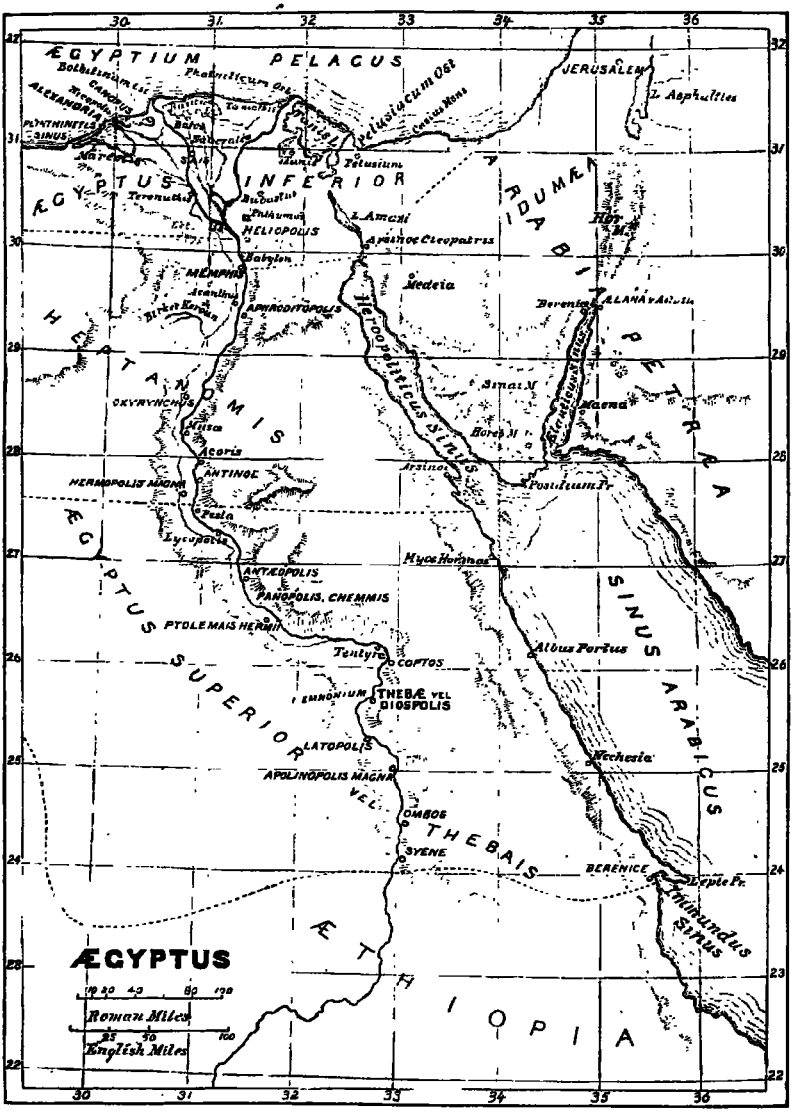


THE EGYPTIAN LEGAL SYSTEM

I

The Egyptian Legal System

1. Egypt and the Nile Valley—The earliest legal system.
2. The king the fountain of justice—The chief judge and prime minister—The courts.
3. Maat, the goddess of justice—Egyptian philosophy of justice—Harmhab's search for the perfect judges—Thutmose's instructions to his chief judge.
4. The king as legislator—Menes, the first law-giver—Harmhab, the legislator-king—The lost codes.
5. Transactional documents—Pictographs—Ramses II's treaty with the Hittites—Hieratic script—Uah's will—Demotic script—Bond for release of a prisoner—Marriage-contract—Greek script—Roman decision in Greek.
6. Judicial procedure—Oldest court record—Lawsuit of Mes v. Khay—Rules for procedure—Trial for treason—Trial for tomb-robbing.
7. Papyrus of Hunefer—Judgment of the Soul.
8. Egyptian system submerged under Greek and Roman and Mohammedan rule.



I. 1—Map of Egypt

I
The Egyptian Legal System

THE true Egypt, both in earliest times and now, is nothing more than the valley of the Nile[1]—the bed of land which that mighty river leaves uncovered for a part of each year, and then reclaims and recovers by its beneficent inundations. In this fertile narrow valley, seven hundred miles long, a teeming population of some eight millions had early developed an elaborate civilization.

Egypt is the most productive country in the world; and in its most flourishing age is said to have contained twenty thousand cities. It deserved to be called, even more than modern Belgium, "one great town." Its location brought it into contact with all the great primitive race-stocks—alike of Africa, of Asia, and of Europe; and to all of them were transmitted some of its literary or artistic or legal ideas.

Egypt's legal system goes back, in veritable historic annals, to beyond B. C. 4000. In its later stages, it was as advanced, in its way, as the superb Egyptian architecture, which has long commanded the modern world's respect for its incredible massiveness, its engineering skill, and its decorative brilliance. The legal system of Egypt, the basis of this elaborate and luxurious civic

life, persisted through many vicissitudes, under invaders from Arabia and Mesopotamia and Persia and Greece; until finally it was supplanted in Caesar's time by the irresistible Roman system.

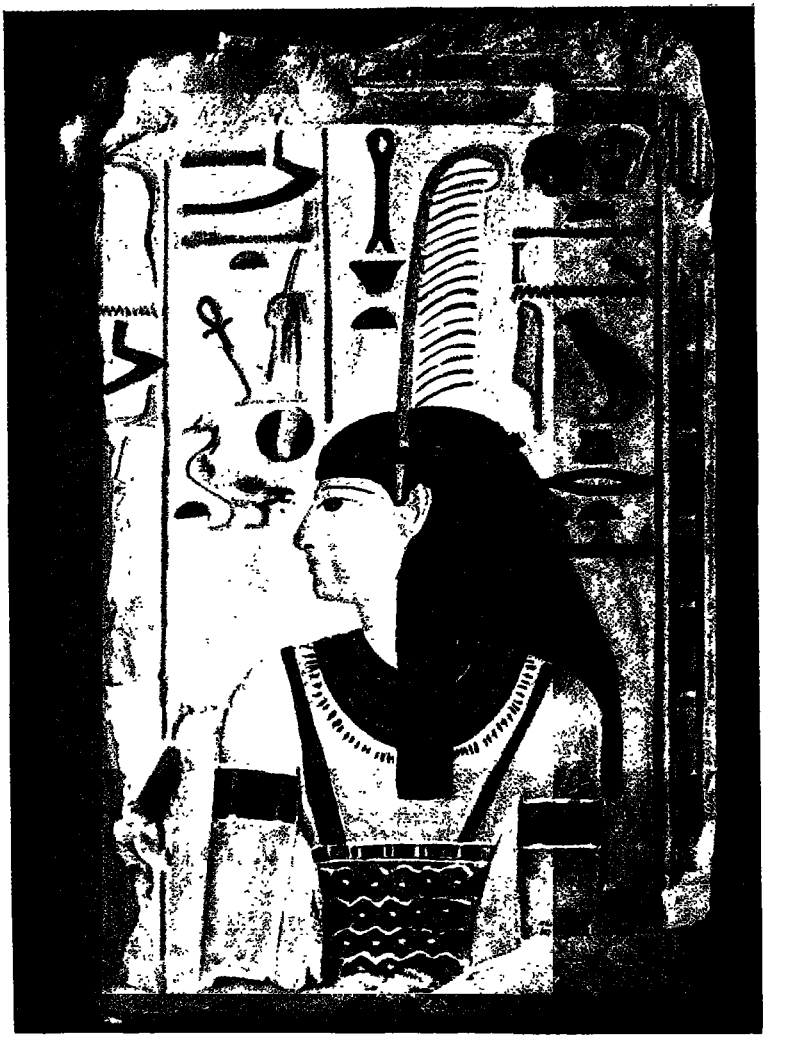
2. The palaces of early Egypt,[2] in which the king and his thirty supreme judges administered justice, were the focus of government. The place of justice was the great hall, with two rows of columns, open at the end. Here were kept the records of title and boundaries, of wills and contracts. Here also all actions were filed.

Originally the office of prime minister and of chief judge were separate; but soon after, and till the end of the kingdom, they were found merged, and the title "chief judge" signified always the king's chief minister. In English history, at the Norman period, an analogous episode enables us to appreciate this union of functions; for under Henry II the Justiciar, so-called, was second only to the king, disposing of every sort of business, controlling the finances, and presiding over the king's court of justice in Westminster. In Egypt, as in all systems prior to the Roman, justice and general administration were not clearly separated. The administrative officials acted also as local judges. There were six provincial courts, and these were under a central court, presided over by the king's chief justice; and the chief justice held daily sittings in the palace, as Pharaoh's deputy.



I. 2—Audience Hall at Philae

Here the king and his judges administered justice; and here were kept the records of title, of contracts, and of wills



I. 3—MAAT, GODDESS OF JUSTICE

The feather of justice, erect on the head-dress, was her emblem; and her image was worn on a gold collar by the Chief Justice

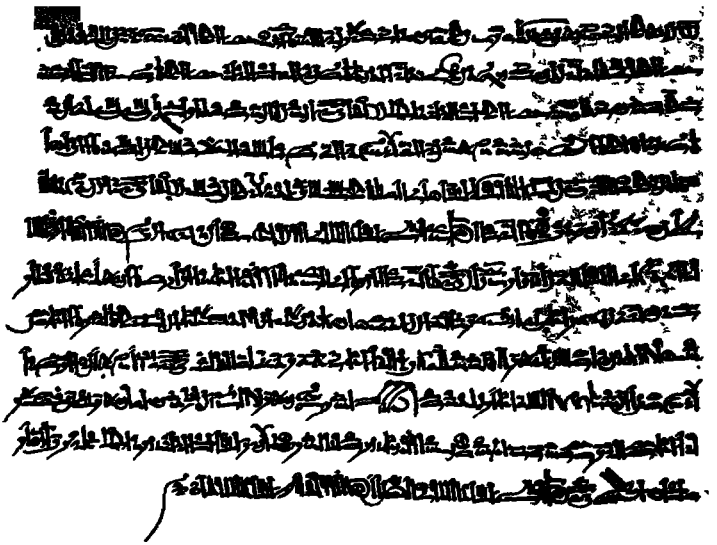
3. *Justice and Judges*

Nevertheless, the Egyptian king was constitutionally the sole supreme ruler. He ruled according to law; but he was its autocratic spokesman. In theory of law, every yard of land belonged to him; every man belonged to him, alive or dead, for none could even be buried without the king's assent. All law and all justice proceeded from him.

3. In the Egyptian theology, Maat was the goddess of justice.[3] The feather of justice, erect on her headdress, was her emblem; and her image was worn on a gold collar by the chief justice. The session began when he donned this emblem, and judgment was given by handing it to the successful litigant, in token of his success.

The word "maat" in Egypt had the basic meaning of "straight", or "true", and hence "just". (So also in Greek the word "kanon" meant a "straight rule", hence a "law"; and in Latin "rectum" meant "straight", hence "right"; and in modern Italian "diritto" means "straight", "right", and "law".) In Egypt the just and upright man was said to have "maat"; and the Egyptian kings sometimes assumed the title, "Sun of Maat" or "Justice".

No treatises on law have yet been discovered, and it is not probable that they existed. But the Egyptian king's philosophy of the scope of his attribute of justice may be gleaned from a passage put in the mouth of Ramses III,



I 4—RAMSES III'S DOMESDAY BOOK

in his great survey or record of the kingdom's wealth—a sort of Domesday Book.[1] The papyrus containing this Domesday Book is one hundred and thirty-three feet long, the longest known; and it is called by Professor Breasted "the most sumptuous now extant." At one paragraph in this record, the king recites his achievements as a just ruler:[a]

"I planted the whole land with trees and green things, and made the people to dwell in their shade. I made the land safe, so that a lone woman could go on her way freely, and none would molest her. I rescued the humble from their oppressors. I made every man safe

in his home. I preserved the lives of those who sought my court of justice. The people were well content under my rule."

In the 12th dynasty, Khnem-hotep writes of King Amenemhet I:

"His majesty came that he might abolish wrong, . . . set right the abuses, and restore what one city has taken from another; allotting the water-course rights according to the recorded titles of former times, that he might do justice."

And one of the early judges, Hetep-her-khut, in the fifth dynasty, says of himself,

"I never took away anything by force from any man. I never did an act of oppression to any man. For God loveth the thing that is just."

One long edict of King Harmhab has survived; and a passage in it reveals to us, not only this king's active interest in the administration of justice, but the world-old prevalence of the problem how to find the just and competent judge. The passage reads:

[*Harmhab's Edict for Judges.*][b] "I have sailed and traveled throughout the entire land. I have sought out two judges perfect in speech, excellent in character, skilled in penetrating the innermost thoughts of men, and acquainted with the procedure of the palace and the laws of the court. I have set them one in each of the two capital cities, North and South. I have furnished them with the official records and ordinances. I have instructed them in the way of justice. I have said to them, 'You shall not take money from one party and decide without hearing the other; for how could you sit as judges upon other men's deeds when one among you is himself committing an offence against justice? The penalty for such an

offence shall be death.' And I the king have decreed this, that the laws of Egypt may be bettered, and that suitors may not be oppressed. For I the king have in memory the acts of oppression which have been done in the land."

One of the most impressive passages in the annals of the world's justice is the speech of instructions purporting to have been pronounced by King Thutmose III (who ruled at the height of Egypt's power, about B. C. 1500) in appointing Rekhmire to the post of chief judge over the kingdom; the instructions are recorded on the tomb of Rekhmire, and here are a few of its sentences:[c]

[*Thutmose III's Instructions to Chief Justice Rekhmire.*] "Regulation laid upon the chief judge, Rekhmire. The officials were brought to the audience-hall; his majesty commanded that the chief judge, Rekhmire, be presented for appointment for the first time.

"His majesty spake before him: 'Take heed to thyself for the hall of the chief judge; be watchful over all that is done therein. Behold, it is a support of the whole land; behold, as for the chief judge, behold, he is not sweet, behold, bitter is he, when he speaks Behold, he is not one setting his face toward the officials and councilors, neither one making brethren of all the people Mayest thou see to it for thyself, to do everything after that which is in accordance with law; to do everything according to the right thereof lo, it is the safety of an official to do things according to the law, by doing that which is spoken by the petitioner

"'It is an abomination of the god to show partiality. This is the teaching: thou shalt act alike to all, shalt regard him who is known to thee like him who is unknown to thee, and him who is near to

. . . . like him who is far An official who does this, then shall he flourish greatly in the place.

"'Do not avoid a petitioner, nor yet nod thy head when he speaks. As for him who draws near, who will approach to thee, do not the things which he saith in speaking. Thou shalt punish him when thou hast let him hear that on account of which thou punishest him.

"'Be not enraged toward a man unjustly, but be thou enraged concerning that about which one should be enraged.

"'Show forth the fear of thee; let one be afraid of thee, for a prince is a prince of whom one is afraid. Lo, the true dread of a prince is to do justice.

"' Thou shalt do thy office, as thou doest justice. Lo, one shall desire to do justice Lo, one shall say of the chief scribe of the chief judge: 'A scribe of justice', shall one say of him'".

4. The king was also, in theory, the sole legislator. The earliest human law-giver, in Egyptian tradition, was named Menes (or, Mna); his date in history was as early as B. C. 3200. His emblem was a bull; and in a hieroglyph, the most primitive form yet discovered, Menes is shown sacrificing, with his bull nearby; and the later kings of Egypt were fond of assuming the appellation "Mighty Bull." But an astounding coincidence, still unexplained by the science of comparative law, is not only that this name of the first human law-giver, as handed down by tradition, was substantially the same in three of the oldest civilizations—Menes, in Egypt, Minos in Crete,

and Manu in India; but that in all three also the bull was the animal held sacred as his emblem.

Some of these royal legislators' names are preserved in fame, for the codes which they promulgated. The greatest was Harmhab, who lived about B. C. 1100; and a portrait statue of him has survived into modern times.[5] Most of the statues that are extant are conventional figures; but this one happens to be a portrait-statue, and it has thus a rare impressiveness. (The great Harmhab, by the way, had married the aunt-in-law of King Tut-ankh-amen, who has in modern times been brought to popular attention.)

The codes in Egypt were placed on the table in court in forty rolls before the judges. But the codes themselves have all disappeared—a colossal calamity for the history of law.

5. Yet the Egyptian legal transactions, both official and private, are amply preserved, to the triumph of modern archaeology.

By reason, however, of the four thousand years over which they range, covering a long period of linguistic development, they are found in a succession of four different scripts—the pictographic, the hieratic, the demotic, and the Greek.



I. 5—HARMHAB, LEGISLATOR-KING

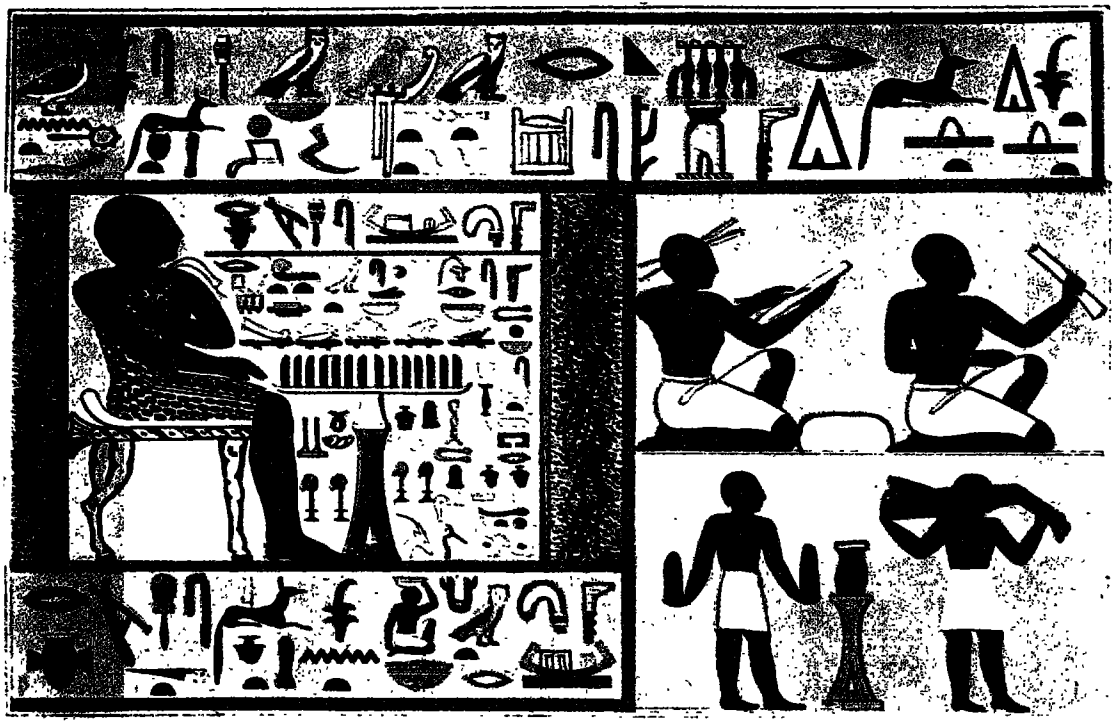
First came the hieroglyph,[6] or pictograph—a symbolic word-picture, apparently the first script-invention of the human race; this was often in colours, painted on the walls. In this earliest form of script, no strictly legal transactions or judicial records have yet been found. But one of the very first international treaties in world's history is recorded in this script, on the wall at Karnak.[7] This was the treaty of peace between Ramses II and the king of the invading Hittites, about B. C. 1300. Its provisions about extradition reveal the arrival of the Egyptians at the practical use of some of the standard concepts of modern jurisprudence:[d]

[*Extradition Clauses in Ramses II's Treaty.*] "Treaty made between the great chief of Kheta . . . and the great ruler of Egypt a treaty of peace and fraternity, making peace between them forever. . . .

"Article 9. If any official of the territory of Egypt shall abscond and come to the great chief of Kheta, ... he shall not receive them into his service, but shall deliver them back to the great ruler of Egypt their sovereign. . . .

"Article 11. Or if any official shall abscond from the territory of Kheta and come to the great ruler of Egypt, ... he shall not receive them into his service, but shall deliver them back to the great chief of Kheta. . . .

"Article 16. But any man who may thus abscond and be delivered back to the great ruler of Egypt shall not be prosecuted for his offence; his property shall not be seized nor his wives nor children, nor himself be put to death nor mutilated; he shall not be prosecuted for his offence.



I. 6—Hieroglyphic Script, or Pictograph
This passage is from a wall in the Pyramid of Gizeh



I. 7—RAMSES II'S TREATY WITH THE HITTITES
Recorded on the wall at Karnak; this is one of the first international treaties in the world's history, dating about B. C. 1300

"Article 17. Likewise any man who may thus abscond and be delivered back to the great chief of Kheta shall not be prosecuted for his offence; his property shall not be seized nor his wives nor children, nor himself be killed nor mutilated; he shall not be prosecuted for his offence."

The second and later kind of script was the hieratic—a shortened form, used by the educated classes. In this form we possess a will, from the reign of Amenemhet III, which is the oldest testamentary document now extant in the world;[8] the best authorities place it about B. C. 1805. There are older crude stone inscriptions in the nature of wills; but this is the oldest known testamentary document. In its form and style, it shows already an advanced technique; it reads:[c]

[*Will of Uah.*] "I, Uah, devise to my wife Sheftu, the woman of Gesab called Teta, daughter of Sat Sepdu, all properties given to me by my brother Ankh-ren. She shall give it to whomsoever she may see fit of her issue born to me.

"I devise to her the Eastern slaves, 4 persons, that my brother Ankh-ren gave me. She shall give them to whomsoever she may see fit of her children.

"As to my tomb, let me be buried in it with my wife alone.

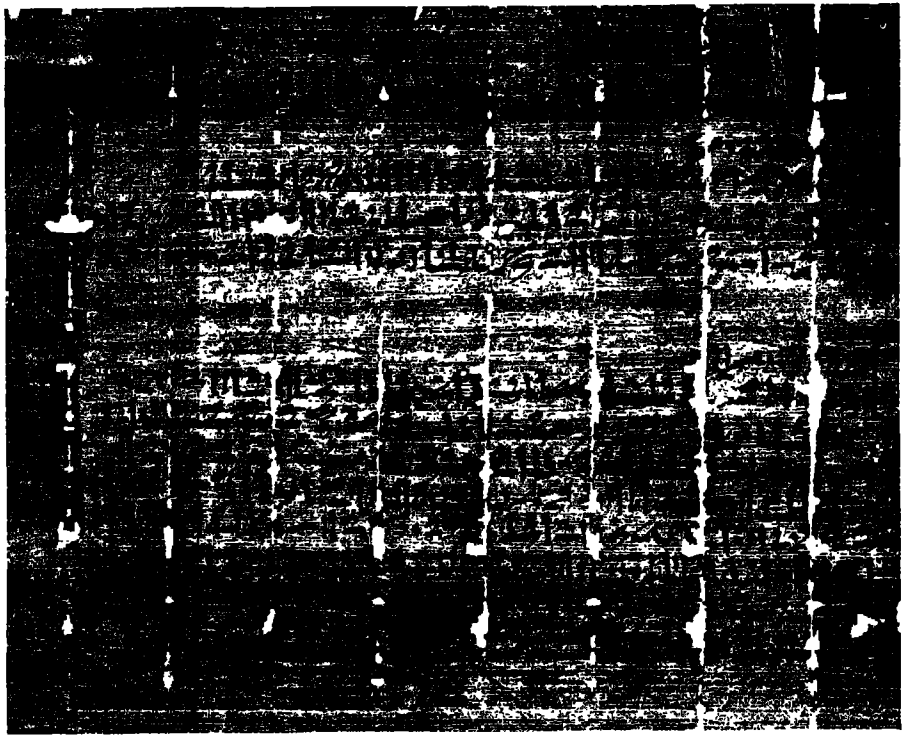
"Moreover, as to the house built for me by my brother Ankh-ren, my wife shall dwell therein and shall not be evicted by any person.

"The deputy Sebu shall act as guardian of my son. Done in the presence of these witnesses:

"Kemen, Decorator of Columns,

"Apu, Doorkeeper of the Temple,

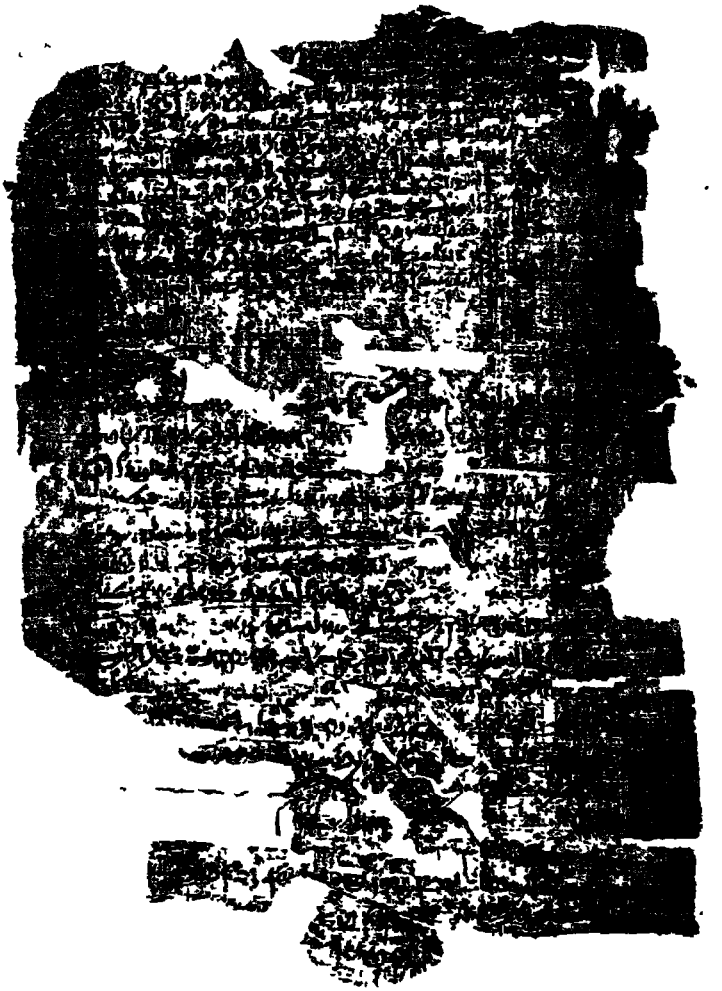
"Senb, son of Senb, Doorkeeper of the Temple."



I. 8—WILL OF UAH
The oldest known testamentary document, dating about B. C. 1800

The third kind of script was the demotic—a cursive and popular form. An example of the demotic script is found in a bond[g] given for the release of a jail-prisoner, about B. C. 250; apparently the transaction is analogous to the early English "mainprise"; here a party sentenced to imprisonment is bailed out, for economy's sake, as temporary serf to some citizen or official who executes this document promising to produce the prisoner on demand of the inspector:[f]

[*Bail-Bond.*] "Year 39, 20th day of month Tybi, reign of king Ptolemy. Teos, son of Pozz, whose mother is Herieus, farmer of the royal domain of the township of Souchos Arsinoe, chief watchman of the district of Themistes. I hereby go bail for the farmer Gyl-Isis, son of Thotemheb whose mother is Tatemounis [note that the party identifies himself through his grandmother, not his grandfather], who is imprisoned by thine order. Thou hast entrusted him to me, and I will cause him to appear before thee or thy representative in the township of Souchos Arsinoe and the district aforesaid, from and after the said date at any time when thou shalt come to inspect the said district. If thou reclaimest him, I will bring him to the place which thou shalt designate in the township on five days' notice, whenever thou shalt come on inspection, without any privilege for him to take sanctuary in a divine temple or at a king's altar or a place of swearing or a place of asylum. If thou reclaimest him, and I do not bring him to the place designated within five days after notice, at any time that thou mayest come to inspect the said district in the said township, I shall submit to any terms that may be imposed by thee, on the day next ensuing the said fifth day, without dispute or further delay. All my property, now or hereafter owned, shall be security for the obligation herein



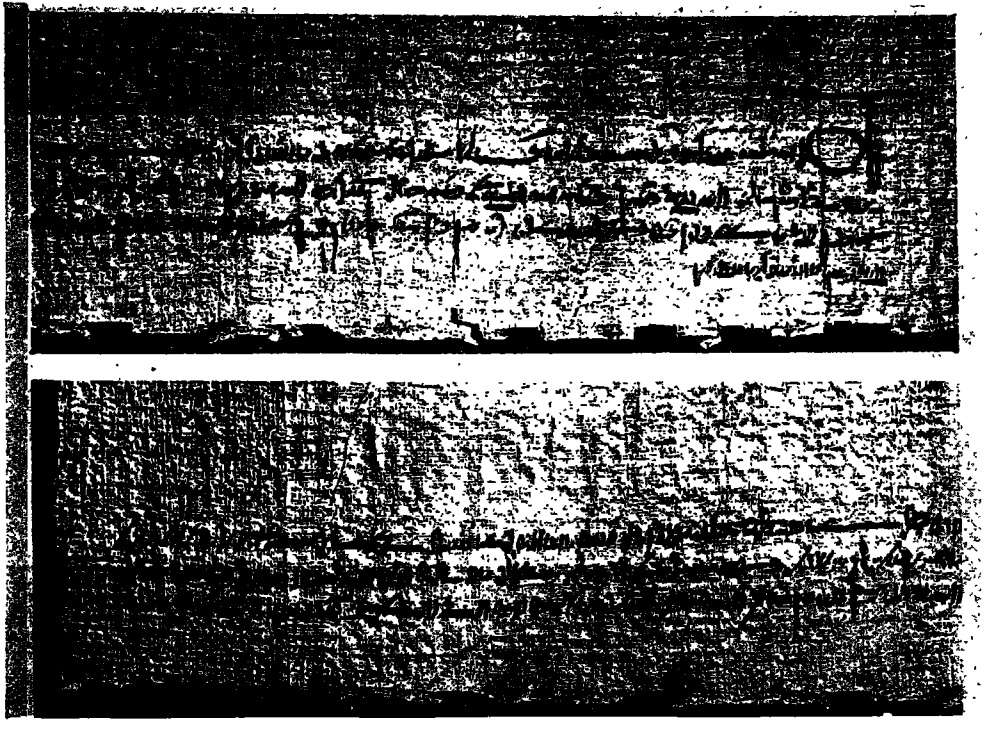
I. 9—BAIL-BOND FOR A JAIL-PRISONER
The party sentenced to imprisonment is bailed out as temporary serf by the obligor of this instrument

described, until I shall have performed it to thee. I shall not be entitled to assert that I have performed all the terms of this instrument now delivered to thee. Thy representative is empowered to enforce any terms to be imposed on me under this instrument, and I will submit to his directions, unconditionally and promptly.—Written by [the notary] Marres, son of Neitheus".

But the types of legal transaction represented in all these documents are numerous—marriage-contracts, deeds of land and of houses, leases, sales, wills, and all the familiar ones of every advanced system. In this marriage-contract (from the fourth century before Christ)[10] it is the woman who has the option of divorce, and retains the greater property-interest:[g]

[*Marriage-Contract.*] "In the month Athyr of year I of King Khabbash, the Lady Settyr-benne, daughter of Peteharpokrates and Semminis, has said to Teos, son of Pow and Nesoharpokrates: 'Thou makest me thy wife, thou givest me two and a half silver staters as wedding-gift. If I divorce thee as husband, hating thee and loving another more than thee [!], I shall restore to thee one-half this wedding gift. I grant unto thee one-third of all my property acquired during our marriage. This contract, a duplicate handed to thee, is hereby acknowledged in the presence of sixteen witnesses, and shall not be changed without thy consent, either orally or in writing.' Peteharpokrates, Notary."

These terms illustrate one of the unique features of the native Egyptian system—the independence and equality of women with men in all legal relations; and the Egyptians are apparently the only race-stock that retained the institutions of equal woman-right, while also advancing

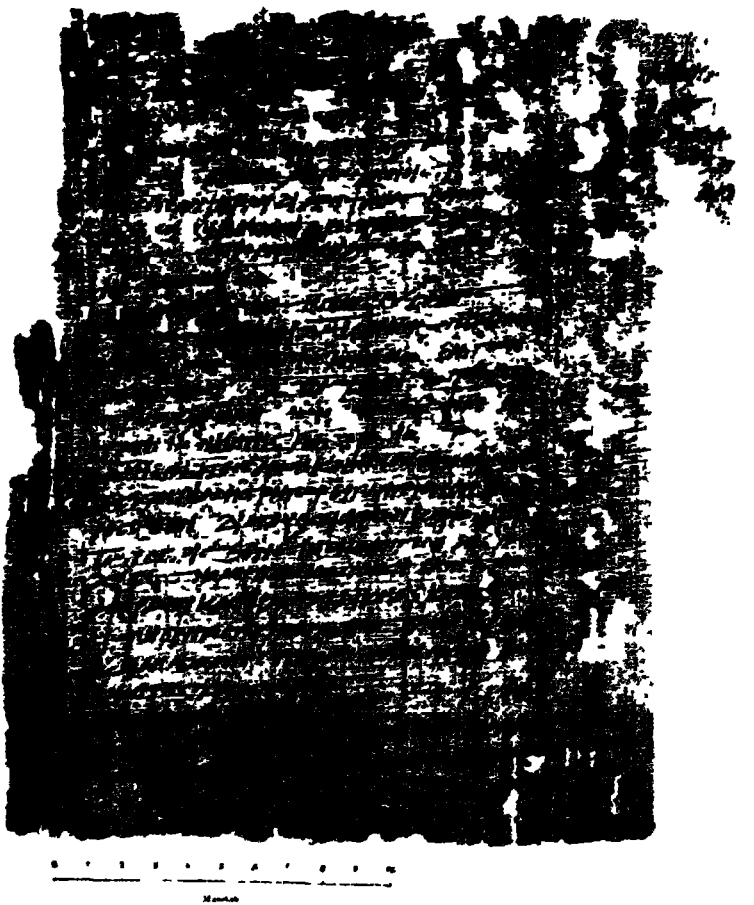


I. 10—Marriage-Contract
From the 4th century B. C. Here the woman has the option of divorce.

to a highly complex civilization. In sharp contrast with the above marriage-contract are some others dating under the Greek domination, two centuries later. In these later marriage-contracts it is the husband who speaks, and it is thus the husband who says, "If I divorce thee, I shall restore thy dowry"; and in these contracts the woman does not grant to the husband a share of her acquisitions during marriage, but brings to him at the wedding a dowry of specified value, which remains at her disposal. This contrast between the two types of marriage-contracts foreshadows the process of gradual undermining and transformation of the ancient native Egyptian system under the successive influences of Greek law, Roman law, and Mohammedan law, during the ensuing thousand years after Alexander the Great.

The fourth kind of script used in Egypt was the Greek. Its vogue is shown[11] in decisions by Roman praetors in Egypt, between Roman parties, written on papyrus in Greek, and dating in the third century A. D. The Greek language came widely into use under the domination of Alexander and his successors, three centuries before Christ, and remained as the standard script for centuries, even under the Romans and down to the time of the Arabs.

It was through the Greek and the demotic scripts that the mysterious pictographs came finally to be deciphered,



I. 11—Roman Law in Greek Script in Egypt
A decision of a Roman praetor between Roman parties

just a century ago, by Young and Champollion. For the tablet known as the Rosetta Stone was found to bear a tri-lingual inscription, in pictograph, demotic, and Greek, dating from the Greek period of the Ptolemies; and thus the secret of the pictograph was slowly unravelled.

6. There was no profession of advocates in the Egyptian system. But in their law-suits the practice of written pleadings had been devised. The Greek historian-traveler Diodorus has preserved for us a brief description of the proceedings;[h] and his comments on the difference between the royal courts of Egypt and the popular courts familiar to him in the Greek cities (*post*, Chap. VI) reflect traits of human nature that will be recognized by the modern lawyer:

"The judges are chosen ten each from Heliopolis, Thebes, and Memphis; and this court, it may be conceded, is in no way inferior to the Athenian Areopagus or the Spartan Senate.

"Upon assembling, this bench of thirty chooses from itself the best one as chief justice, and in his stead the city names another judge. The stipends for their maintenance and other necessaries are supplied by the king, a much larger sum going to the chief justice. He used to wear hanging from his neck by a chain of gold an image made of the most precious stones, to which they give the name of Truth;

when this is put on by the chief justice, it marks the beginning of the proceedings. Then the eight books, in which are contained all the laws written out, being laid before the judges, the custom was that the complainant should present the particulars of his case in writing, first the charge, then the facts, and then the amount of damage done. Next, the defendant, after receiving from the complainant the document of complaint, answers in writing each point, by asserting either that he did not do it; or that if he did it was not wrongful; or, if it was, it merits a less penalty. Then the complainant replied in writing, and the defendant made a second answer.

"After the parties had thus twice presented their case in writing, then it was the task of the thirty judges to discuss among themselves their judgment and of the chief justice to hand the image of Truth to one or the other of the parties [in token of obtaining the judgment].

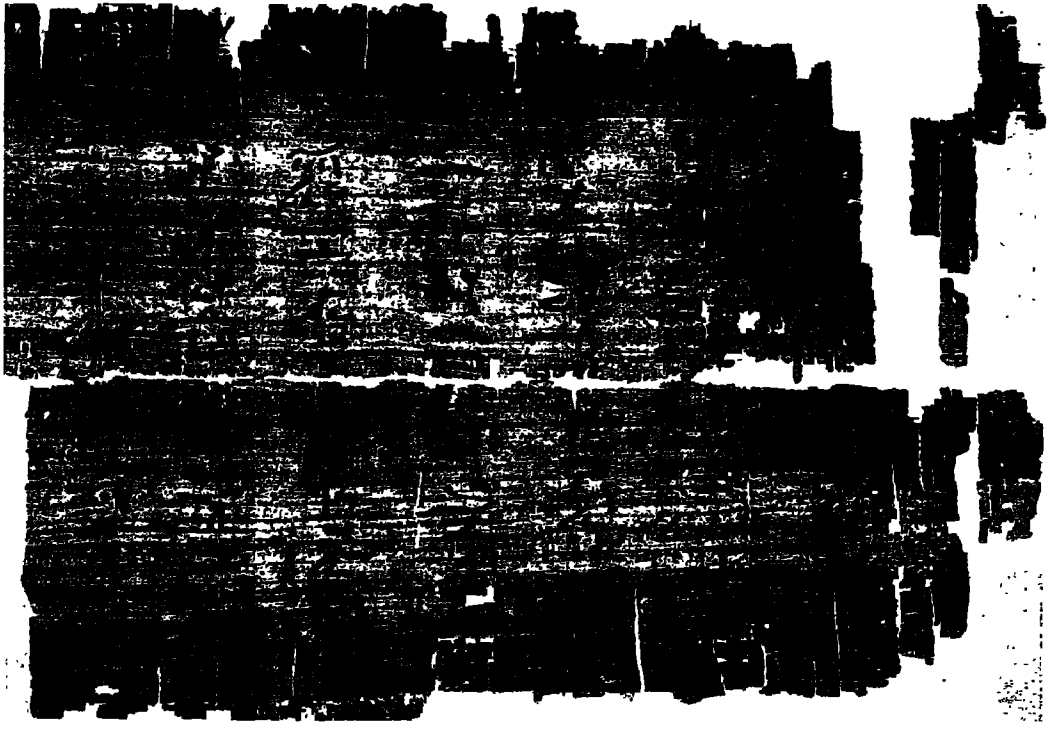
"Such among the Egyptians is the manner of conducting all formal proceedings of the courts [i. e. without any speeches from advocates]. For they believe that from speeches of advocates much clouding of the legal issues would result; the cleverness of the speakers, the spell of their delivery, the tears of the accused, influence many persons to ignore the strict rules of law and the standards of truth. For very often [in other countries]

one sees experienced members of courts, whether through fallacious argument or pleasing voice or compassionate emotion, swept away by the eloquence of the speaker; whereas [the Egyptians] believe that if the parties themselves submit their case in writing, the bare facts alone being thus taken into account, a more correct judgment will be reached; and thus the readier speakers will gain no advantage over the slower ones, nor the skilled over the unskilled, nor the bold lying ones over the diffident truthful ones; but that all will have equal opportunity before the law by simply allowing ample time for the parties to study their pleadings and for the judges to deliberate and decide upon the allegations of the respective parties."

We do not possess the pleadings themselves, but we have some court records of them. This papyrus, preserved in the hieratic script, is the oldest court record in the world yet discovered; it dates from about twenty-five hundred years before Christ.[12] The record says:[i]

[*The Oldest Court Record.*] "The party Sebekotep alleges that one Usser, now deceased, father of the other party Thau, made the said Sebekotep to be guardian of his, the said Usser's wife and children, and to that end delivered all his property to the said Sebekotep, to be applied to the use of the said Usser's family, whether or not the property increased or decreased. But the party Thau denies that his father ever made any such conveyance.

"If the said Sebekotep produces credible witnesses who will make oath that the said Usser did in their presence deliver the



I. 12—COURT-MINUTE, ABOUT B. C. 2500
The oldest extant court record in the world

property on the terms set forth in the said Sebekotep's written pleading, then the property is to remain in his possession. But if he does not produce such witnesses, then none of the said Usser's property shall remain in Sebekotep's possession, but shall be delivered to the said Thau, son of Usser."

Of civil cases, few records have yet been discovered. But the celebrated lawsuit of Mes v. Khay is preserved in fragments ample enough to reveal a highly developed system of judicial inquiry and formal litigation. This case took place in the reign of Ramses II (say, B. C. 1300). It was an appeal from a prior judgment, forming apparently the fifth stage in a long series of lawsuits over the title to land. Mes, the appellant, asserts that the prior judgment in favor of Khay, the appellee, had been obtained by the use of fraudulent entries in a land register affecting the party's descent and by forged documents of title. The final judgment on this appeal is unfortunately missing in the papyrus; but the parties' briefs, and the abstract of testimony, read as follows:[j]

[*Lawsuit of Mes v. Khay.*] [*1. Brief of the Plaintiff Mes.*] [*a. Early History of the Estates of Neshi.*] What was said by the of the bearer of weapons, who . . . Rameses, Mes.

"As for me, I am the son of Hui, the son of Urnero, the daughter of Neshi. A division of property was made for Urnero and her brothers and sister in the Great Court in the time of Horemheb. They sent the clerical Iniy, who was an officer of the Great Court, to the district of Neshi: and a division was made for me and my brothers and sisters; and they made my mother, the dweller in the

town, Urnero, administrator for her brothers and sisters. Then Takharu, the sister of Urnero, pleaded together with Urnero before the Great Court. The court officer was sent forth, and they caused each of the six heirs to take cognisance of his portion. Now the king Amosis I had given . . . arourae of land as a reward to Neshi my father. And further, since king Amosis I, this land was held by one heir after another until this day. Then Hui, my father, and his mother Urnero pleaded together with their brothers and sisters before the Great Court and the Court of Memphis writing.

"Then my father Hui died.

[*b. The Litigation between Nubnofret and Khay.*] "And Nubnofret my mother came to till the portion of Neshi my [grand] father, but she was not allowed to till it. Then she laid a plaint against the administrator Khay, and they caused them to appear before the Court in Heliopolis in the year 14 . . . of King Ramses II. Then laid a plaint saying: 'Of a truth I am cast forth from this land of Neshi my father.' Then she said: 'Let there be brought to me the registers from the Treasury, and likewise from the Department of the Granary of Pharaoh. For I am well pleased to say, that I am the daughter of Neshi. Division was made for me together with them, but the administrator Khay does not know my right as a sister.'

"The administrator Khay laid a plaint in the Great Court in the year 18, and they sent forth the clerical Amenemiopet, who was an officer of the Great Court, together with him, having a false register in his hand, whereby I ceased to be a child of Neshi. And they made the administrator Khay administrator for his brothers and sisters in the place of my heirship, although I was an heir of Neshi my father.

[*c. Mes Appeals against the Judgment in Favour of Khay.*] "And now see! I am in the district of Neshi my [grand] father, in which is the land of Neshi my [grand] father. Let me be examined and

let me see whether Urnero was the mother of Hui my father, who was called the son of Neshi, although she is not duly enrolled in the register, which the administrator Khay made against me together with the court officer who came with him. I bring a plaint saying: it is a false register that has been made against me. For verily when I was examined before, I was found to be inscribed. Let me be examined together with my coheirs before the notables of the town, and let me see whether I am the son of Neshi, or whether it is not so."

[*2. Brief of the Defendant Khay.*] [*a. Khay's Version of the Early History of the Estates.*] What was said by the administrator Khay.

"I am the son of the administrator Userhat, the son of Thaui the son of Prehotep. He gave to me his portion of lands in writing in the time of king Horemheb before witnesses; and it was the chief of the stable Hui the son of Prehotep who had tilled it since the time of king Amenothes. I succeeded to him in the time of Horemheb unto this day. Then the scribe Hui and the dweller in the town Nubnofret seized my portion of lands: and she gave them to the artificer Khay iri.

[*b. The Lawsuit between Khay and Nubnofret.*] "Then I laid a plaint before the Judge in Heliopolis, and he caused me to plead together with Nubnofret before the Judge in the Great Court. I brought my testimonies . . . in my hand since Amosis I, and Nubnofret brought her testimonies in like manner. Then they were unrolled before the Judge in the Great Court. And the Judge said to her: 'These documents were written by one of the two parties.'

"Then Nubnofret said to the Judge: 'Let there be brought to me the two registers from the Treasury and likewise from the Department of the Granary.' And the Judge said to her: 'Very good is that which thou sayest.' Then they brought us downstream to Per-Ramessu. And they entered into the Treasury of

Pharaoh, and likewise into the Department of the Granary of Pharaoh, and they brought the two registers before the Judge in the Great Court. Then the Judge said to Nubnofret: 'Who is thy heir among the heirs who are upon the two registers that are in our hand?' And Nubnofret said: 'There is no heir in them.' 'Then thou art in the wrong,' said the Judge to her.

"Then the scribe of the royal table, Kha, the son of Mentuemmin, said to the Judge: 'What is the decision which thou makest with regard to Nubnofret?' And the Judge said to Kha: 'Thou belongest to the Residence. Go then to the Treasury, and see how the matter stands with her.' And Kha went out, and he said to her: 'I have examined the documents. Thou are not inscribed in them.'

"Then they summoned the clerical, Amenemiopet, and they sent him forth, saying: 'Call together the heirs, and show unto them the lands, and make a division for them.' So did they command him together with the Court of Memphis.

"Then I sent the , Ruiniuma (?) who was overseer of horses. And the officer of the court, Amenemiopet, summoned Mesmen, saying, 'Come': Then they summoned him to the West bank. And they gave to me thirteen arourae of land and they gave lands to the coheirs before the notables of the town."

[*3. Evidence.*] "(1) What was said by the goatherd Mesmen: 'By Amon and by the Prince, I speak by the truth of Pharaoh, and I speak not falsely; and if I speak falsely, may my nose and my ears be cut off, and may I be transported to Kush. The scribe Hui was the son of Urnero, and, as they say, the son of Neshi. I saw Urnero lands.'

"(2) What was said by the administrator Khay:

'By Amon and by the Prince. The scribe Hui was the son of Urnero the daughter of Neshi. And if . . . say: "It is not

truth", then let me be put to confusion. By Amon and by the Prince not cultivate beyond them. Their harvest was taxed'

"(3) What was said by . . . :

'By Amon and by the Prince, if they examine and if they find that I cultivated portion me, let me be put to confusion.'

"(4) What said by the priest of the temple of Ptah:

'By Amon and by the Prince, I speak in truth, and I speak not falsely; and if I speak falsely, may my nose and my ears be cut off, and may I be transported to Kush. I knew the scribe Hui the son of Urnero. He cultivated his lands from year to year, and he cultivated them saying: "I am the son of Urnero, the daughter of Neshi"'.

"(5) What was said by the honey-maker of the Treasury of Pharaoh Hori:

'By Amon and by the Prince, if I speak falsely, may my nose and my ears be cut off and may I be transported to Kush. The scribe Hui was the son of Urnero; and moreover, Urnero was the daughter of Neshi.'

"(6) What was said by the chief of the stable Nebnefer:

"Likewise saying: 'As for the scribe Hui, he used to cultivate his lands from year to year, doing all that he desired. And they gathered in for him the harvest of his fields year by year. Then he pleaded together with the dweller in the town Takharu the mother of the officer Smentoui. And then he pleaded together with Smentoui her son, and they gave the lands to Hui, and they were duly confirmed to him.'

"(7) What was said by the Buthartef:

"Likewise saying: 'The scribe Hui was the son of Urnero, and Urnero was the daughter of Neshi.'



I. 13—Audience Hall at Karnak

"Then the magnates of the South shall stand in the aisles before the Chief Judge, . and the scribes of the Chief Judge at his either hand"

"(8) What was said by the dweller in the town Peihay:

'By Amon, and by the Prince, if I speak falsely, may I be sent to the back of the house. The scribe Hui was the son of Urnero; and moreover, Urnero was the daughter of Neshi.'

"(9) What was said by the dweller in the town Pipuemuia: "Likewise.

"(10) What was said by the dweller in the town Tuy:
"Likewise."

The precise order of proceedings (apart from Diodorus' brief account, already quoted) has not been found described in any formal Egyptian treatise (and probably none such were composed). But one may gain an impression of the daily scene of justice in the great hall of Karnak[13] from the inscription on the tomb of Rekhmire, chief judge, wherein the king's instructions describe the duties of that high official:[k]

[*Proceedings in Court.*] "Arrangement of the sitting of the governor of the residence city, and chief judge of the Southern City, and of the court, in the hall of the chief judge. As for every act of this office, the chief judge, while hearing in the hall of the chief judge, shall sit upon a chair, with a rug upon the floor, and a dais upon it, a cushion under his back, a cushion under his feet, a upon it, and a baton at his hand; the forty rolls of the law shall be open before him. Then the magnates of the South shall stand on the two aisles before him, while the master of the privy chamber is on his right, the receiver of income on his left, the scribes of the chief judge at his either hand; one corresponding to another, with each man at his proper place.

"One shall be heard after another, without allowing one who is behind to be heard before one who is front. If one in front says:

'There is none being heard at my hand' then he shall be taken by the messenger of the chief judge.

"Let not any official be empowered to judge against a superior in his hall. If there be any assailant against any of these officials in his hall, then he shall cause that he be brought to the chief judgment-hall. It is the chief judge who shall punish him, in order to expiate his fault. Let not any official have power to punish in his hall

"As for every process-deputy whom the chief judge sends with a message for an official, from the first official to the last, let him not be swerved, and let him not be conducted; the official shall repeat the chief judge's message while the deputy stands before the official repeating his message and going forth to wait for him. The deputy shall have power to seize the mayors and village elders for the judgment-hall;

"Now, as for every act of the chief judge, while hearing in his hall; and as for every one who shall he shall record everything concerning which he hears him. He who has not disproved the charge at his hearing, which takes place then it shall be entered in the criminal docket. He who is in the great prison, not able to disprove the charge of the chief judge's warrant, likewise; when their case comes on another time, then one shall report and determine whether it is in the criminal docket, and there shall be executed the things concerning which entry was made, in order to expiate their offense.

"As for any writing sent by the chief judge to any lesser official's hall, being those which are not confidential, it shall be taken to him together with the documents of the keepers thereof under seal of the . . . officers, and the scribes thereof after them; then he shall open it; then after he has seen it, it shall return to its place, sealed with the seal of the chief judge. But if he furthermore ask for a confidential writing, then let it not be taken by the keepers thereof.

6. *Judicial Procedure*

"Now, as for every petitioner to the chief judge concerning lands, he shall dispatch the process-deputy to him, in addition to a hearing of the land-overseer and the local council of the district. He shall decree a stay for him of two months for his lands in the South or North. As for his lands, however, which are near to the Southern City and to the court, he shall decree a stay for him of three days, being that which is according to law; for he shall hear every petitioner according to this law which is in his hand.

"Every property-list is brought to the chief judge; it is he who seals it.

"It is he who administers the gift-lands in all regions. As for every petitioner who shall say: 'Our boundary is unsettled;' one shall examine whether it is under the seal of the official thereof; then he shall seize the seizures of the local council who unsettled it.

"One shall put every petition in writing, not permitting that he petition orally. Every petitioner to the king shall be reported to the chief judge after he puts it in writing.

". The records of the township are in the chief judge's hall. It is he who hears concerning all lands. It is he who makes the boundary of every township, the field all divine offerings and every contract.

"It is he who takes every deposition; it is he who hears the rejoinder when a man comes for argument with his opponent.

"It is he who appoints every special judge to the hall of judgment, when any litigant comes to him from the king's house. It is he who hears every edict.

"Every report shall be reported to the chief judge by the doorkeeper of the judgment-hall, who reports on his part all that the chief judge does while hearing in the hall of the chief judge."

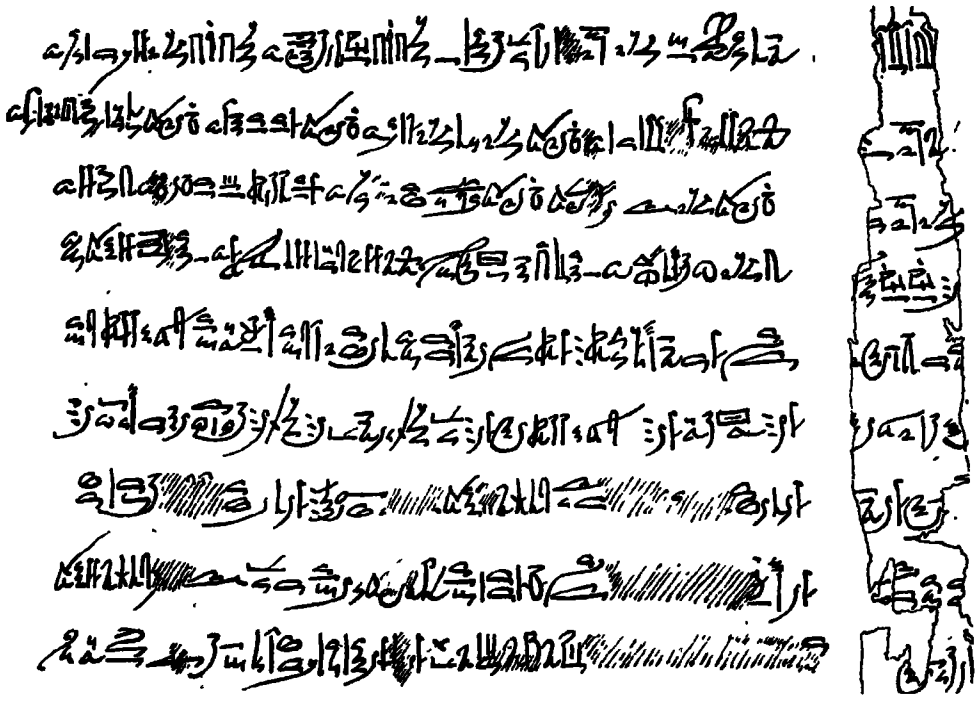
Several elaborate records of important criminal trials are fortunately extant. Examining magistrates were

deputed to take testimony; and their full report of the testimony and findings was entered as a record of the trial. One of these trial records[14]—a sensational one, for treason—some twelve hundred years before Christ, opens with a warrant from the king himself, Ramses III, appointing a special high commission court for this case. It reads:[1]

[*Royal Warrant Appointing a Special Court.*] "I, the king, direct that search be made throughout the land and the persons be arrested and put on trial who are reputed by public ill-fame to have done this treason. And I commission the Lord High Chamberlain, the Lord Chancellor [etc., etc., naming them] for the purpose. I know nothing of the truth of the charges. Do you examine into them, and then cause the guilty ones to die, either by their own hand or by the executioner; and this without further reference of the case to me in person. Take great heed that the innocent be not punished. But let the deeds of those who are guilty fall surely upon their own heads, that I may be protected and defended forever on my throne, as a just king in the sight of Ammon, chief of gods, and Osiris, ruler of Eternity."

In the rest of this record it appears that there were four sets of accused: the principals, the accomplices in two degrees, and the innocent. The first set were executed; the second set were required to commit suicide; the third set suffered the slicing off of their noses and ears. The entry in the record for the second set reads thus:

"The following persons were charged with conspiracy with the principals; they were brought before the special court for trial; they



I. 14—Ramses III's Special High Commission for Trial of Treason
"I the King direct that search be made throughout the land and the persons be arrested and put on trial who are reputed by ill-fame to have done this treason"

were tried and found guilty; they were allowed to die by their own hand in the place of trial, and they did so, and were not executed."

The analogy here to the Japanese theory of hara-kiri is striking; and those two systems appear to be the only legal systems adopting that form of penalty.

That the system of judicial investigation was well developed appears plainly in the record of the famous Tomb-Robbing Trial, in the reign of Ramses IX; the incidents of this scandal, echoing down the ages, have been remarkably corroborated by the excavations of modern archaeologists. It seems that in the metropolis of Thebes, where the richly jeweled tombs of the Pharaohs were located, rumors of the plundering of the tombs came to the ears of Peser, mayor of the East side, and he laid information before the chief judge. The tombs were on the west side of the city, under a second mayor, Pewero, apparently a political rival of the other mayor. The chief judge sent deputies to inspect the tombs, and some of them were found to be uninjured. Some of Pewero's subordinates, treating this as a vindication of his administration, proceeded to the house of the other mayor, Peser, and exulted publicly, to his chagrin. He angrily retorted that the inspection had been a farce. This slander was reported promptly to the chief judge, who then directed a trial of the three coppersmiths, em-

ployees of a temple, who had been accused of robbing these particular tombs, and one of whom had confessed when arrested and examined under the lash. The first passage here quoted shows the method used to test the truth of his confession; the second is the record of the final trial:[m]

[*Trial of the Tomb-Robbers.*] [*Examination of the Coppersmith.*] "Then the chief judge and the butler had the coppersmith taken before them to the tomb, while he was blindfolded as a man He was permitted to see again, when he had reached them. The officials said to him: 'Go before us to the tomb, from which you said: "I carried away the things". The coppersmith went before the nobles to one of the tombs of the king's children in which no one was buried, which was left open, and to the hut of the workman of the necropolis which was in this place saying: 'Behold, the tombs in which I was.' The nobles examined the coppersmith with a severe examination in the great valley, but he was not found to know any place there, except the two places upon which he had laid his hand. He took an oath of the king, L. P. H., that he should be mutilated by cutting off his nose and his ears and placed upon the rack if he lied, saying: 'I know not any place here among these tombs, except this tomb which is open, together with the hut upon which I have laid your hands.' The officials examined the tombs of the great seats which are in 'The-Place-of-Beauty', in which the king's-children, king's-wives, king's-mothers, the goodly fathers and mothers of Pharaoh, L. P. H., rest. They were found uninjured."

[*The Trial.*] "Year 16, third month of the first season, day 21; on this day in the great court of the city; beside the two stelae of the forecourt of Amon in the gate called 'Praise'.

"People and nobles who sat in the great court of the city on this day:

"1. Governor of the City and chief judge, Khamwese. . . .

"2. The High Priest of Amon-Re, king of gods, Amenhotep. . . .

"3. The prophet of Amon-Re, king of gods, scribe of 'The-House-of-Millions-of-Years-of-King-Neferkere-Setepnere, L. P. H.', Nesuamon. . . .

"4. The king's-butler, Nesuamon, the scribe of Pharaoh, L. P. H. . . .

"5. The major-domo. . . .

"6. The deputy. . . .

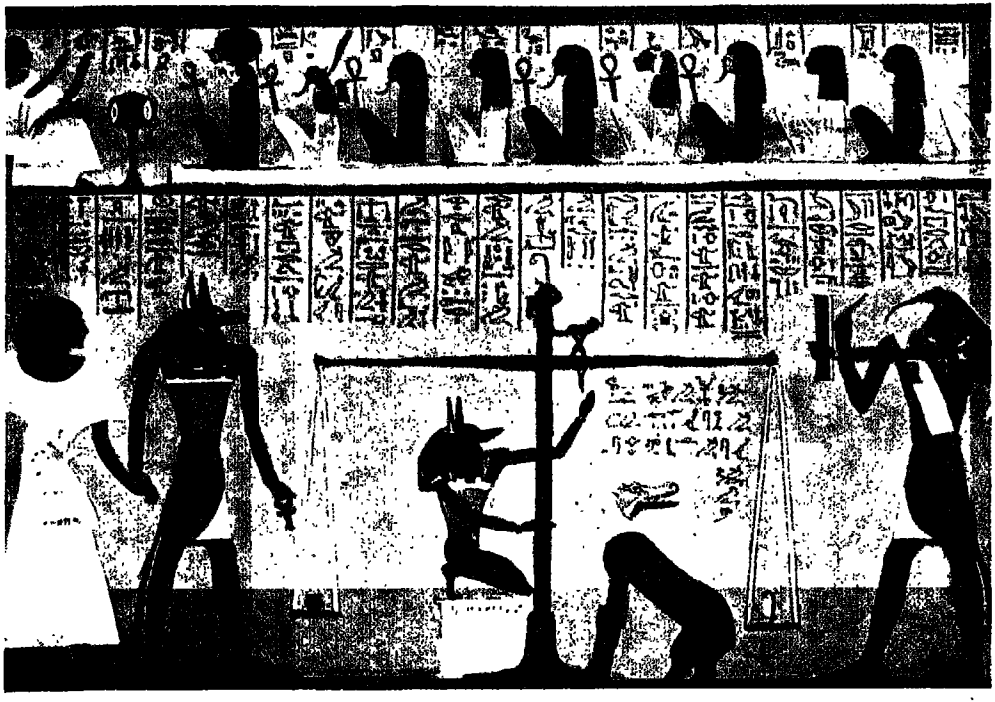
"7. The standard-bearer. . . .

"8. The mayor. . . .

"The governor of the city and chief judge, Khamwese, had brought in the coppersmith, Pekharu; the coppersmith, Tharoy; and the coppersmith Pekamen . . .

"Said the chief judge to the great nobles of the great court of the city: 'This mayor of the city said a few words to the inspectors and workmen of the necropolis, in the year 16, third month of the first season, day 19, in the presence of the king's butler, Nesuamon, the scribe of Pharaoh, L. P. H., delivering himself of slanders concerning the great seats, which are in The-Place-of-Beauty. Now, I, the chief judge of the land, have been there, with the king's-butler, Nesuamon, the scribe of Pharaoh, L. P. H. We inspected the tombs, where the mayor of the city said that the coppersmiths had been. We found them uninjured; and all that he said was found to be untrue. Now, behold, the coppersmiths stand before you; let them tell all that has occurred.' They were examined. It was found that the accused did not know any place in the cemetery of which the mayor had spoken the words. He was found wrong therein.

"The great nobles granted life to the coppersmiths They were reassigned to the High Priest of Amon-Re, king of gods, Amenhotep, on this day.



I. 15—Trial Scene: Papyrus of Hunefer (Left Half)

The Soul of the departed one (the figure in white) answers for his life-conduct. The forty-two assistant judges, seated above, call over the list of offences. An official weighs in the balance the heart of the deceased against the goddess Maat's feather of justice

7. *The Judgment Papyrus*

"The documents thereof are: one roll; it is deposited in the office of the chief judge's archives."

7. The general features of the early Egyptian trial system are symbolized in a great papyrus, done in pictograph, representing the Judgment of the Dead. The soul of the departed one is summoned to appear before the great judge and sun-god, Osiris, in the Hereafter; the departed one here depicted was Hunefer, the king's chancellor.[15] In this scene, in the left half, Hunefer is called upon to defend his life-conduct before the judges. There were forty-two assistant judges; each one took cognizance of a specific offence, thus together covering the whole criminal code. The Soul pleaded "Not Guilty" to each offence, naming them one after another, thus:[n]

"I have not done evil.
"I have not robbed.
"I have not broken in to steal.
"I have not stolen secretly.
"I have not killed men.
"I have not sold wheat with light weight.
"I have not cheated.
"I have not robbed the temple of the God.
"I have not given false testimony.
"I have not stolen food.
"I have not blasphemed.
"I have not assaulted men.
"I have not committed adultery.
"I have not slandered", etc., etc.

And the remarkable thing is that this mode of pleading is still found in modern times, four thousand years later, in some tribes on the West Coast of Africa; the accused, who is put to the ordeal of poison, first makes a series of declarations of his innocence of certain offences, and then drinks the red-water which the magic-doctor gives him.

In the Egyptian proceeding, the judges (seated above in the picture) call over the list of offences; and as the accused answers, an official weighs his heart in the balance on the left, against the Feather of Justice (of the goddess Maat) on the right. The scribe Thoth then announces (in the words of the inscription): "Saith Thoth, the scribe, lord of divine words: Behold, I am declaring, in the home of Osiris, the royal chancellor Hunefer to be true and just. His heart hath come forth in the scales, and hath not been found evil." This expression "true and just" was, in Egyptian practice, the conventional formula for "Not guilty"; and on every tombstone was inscribed this epithet, "true and just" (as a complimentary presumption that the departed one would be found innocent in the hereafter!)

In the case of acquittal, the soul is then led by Horus into the presence of Osiris, the sun-god and great judge of all, with this formula:[16] "Saith Horus, the deputy of his father Osiris, and custodian of Hunefer: Behold, I am



I. 16—Trial Scene: Papyrus of Hunefer (Right Half)
The acquitted Soul is led into the presence of Osiris, sun-god and great judge of all

bringing Hunefer to thee, Osiris. He hath been judged by the scales, the tongue of the balance resteth at its place."

8. The native Egyptian legal system, here typified in the proceedings before Osiris, the supreme last judge of all men, passed through many phases, and survived under several foreign dynasties. But it began to be undermined in the eighth century before Christ, first by civil war, then by conquests of invaders from Assyria, Persia, and Greece. Finally the Roman Caesars arrived to strike the final blow to Egypt's political independence.

And yet its end, just before the Christian era, was marked by a scene which reveals how firmly the tradition of the divine judge Osiris still persisted in the hearts of the native Egyptian people. For during those last days of luxurious Oriental festivity, in which Antony and Cleopatra recklessly indulged at Alexandria, while the shadow hung over them of Caesar Octavian's final impending blow against Antony's power, Antony dared to court popularity before the Egyptian multitude by personating the sun-god Osiris, with Queen Cleopatra as his consort Isis.

But Cleopatra was to be the last queen of Egypt. By the defeat of Antony and Cleopatra at the battle of Actium, their dominion was shattered. The cold imperi-

ous will of Caesar Octavian was proof against Cleopatra's last appeal to him for her kingdom and herself. In death she sought refuge from her chagrin. Egypt, with its Pyramids four thousand years old, became a mere Roman province. Roman law and government supplanted more or less of the native institutions. Seven centuries later the Arab conquerors brought Islamic religion and law. After another thousand years the international court brought the French Code.

And scholars still dispute, as they examine the tons of records embodied in five successive languages, whether particular legal customs of the later Egyptian people are to be traced back to the legal systems of the Pharaohs, or the Greeks, or the Romans, or the Arabs. But today the Pyramids[17] and the pictographs and the papyri are the only sure symbols of the native Egyptian institutions of six thousand years ago.



I. 17—The Pyramids at Evening

Sources and References

Sources of Illustrations

1. *Map of Egypt.* From the map in *Rawlinson,* cited *infra.*
2. *Audience Hall at Philae.* From a drawing reproduced in "Bilder-Atlas," vol. V, Architecture, plate 2, No. 2 (F. A. Brockhaus, Leipzig, 1875).
3. *Maat, Goddess of Justice.* From a photograph furnished by the Museum of Ethnography, Florence, of the original in that Museum (1923).
4. *Ramses III's Domesday Book.* From a photograph furnished by *Dr. T. George Allen,* Oriental Institute of the University of Chicago, of the facsimile, plate 79, in Samuel Birch's edition of the Papyrus Harris (British Museum, 1876).
5. *Harmhab, the Legislator-King.* From a photograph by the *Metropolitan Museum of Art,* New York (1924), of the original in that Museum.
6. *Hieroglyphic Script.* From a facsimile of a script on the Pyramid of Gizeh, in *Karl Faulmann,* "Illustrirte Geschichte der Schrift", p. 238 (Leipzig, 1880).
7. *Ramses II's Treaty with the Hittites.* From a photograph furnished by Dr. *T. George Allen,* Oriental Institute of the University of Chicago, of a photograph of the original by Prof. Ludwig Borchardt, Berlin (1925).
8. *Will of Uah.* From a photograph furnished by *John A. Wilson,* Oriental Institute of the University of Chicago, of a facsimile in *F. Ll. Griffith,* "Hieratic Papyri from Kahun and Gurab", of the original in London University Museum.
9. *Bail-Bond for a Jail-Prisoner.* From a facsimile in *Henri Sottas,* "Papyrus Démotique de Lille", vol. I, plate I, No. 4 (Geuthner, Paris, 1921).
10. *Marriage-Contract.* From a facsimile in *W. Spiegelberg,* "The Papyrus Libbey" (Toledo Museum of Art, 1907), presented to the Museum by Edward Drummond Libbey, the discoverer.
11. *Roman Law in Greek Script in Egypt.* From a photograph by Geo. R. Swain, Ann Arbor, Mich., of a facsimile in *F. Preisigk,* "Griechische Papyrus zu Strassburg", folio 22, the so-called Strassburg Papyrus (Schlesier & Schweikardt, 2 vols., 1906-7), in the University of Michigan Library.
12. *Court-Minute, B. C. 2500.* From a photograph furnished by Dr. *T. George Allen,* Oriental Institute of the University of Chicago, of a photograph by Prof. *Borchardt,* of No. 9010, the original papyrus in the Berlin National Museum (1925), as reproduced in Möller, "Hieratische Paläographie", vol. I, pl. 2.

I. Egyptian Legal System

13. ***Audience Hall in the Palace at Karnak.*** From a drawing reproduced in *George Rawlinson*, "The Story of Ancient Egypt", frontispiece (Putnam, New York, 1891).

14. ***Ramses III's Special High Commission for Trial of Treason.*** From a facsimile drawing in *T. Deveria*, "Le papyrus judiciaire de Turin", plate I, col. 2, Journal Asiatique, Aug.-Sept. 1866, p. 200, Nov.-Dec. 1867, p. 478 (Lemercier, Paris, 1866-1867).

15, 16. ***Trial Scene: Papyrus of Hunefer.*** From a facsimile of the Papyrus Hunefer in Sir *E. A. Wallis Budge*, "Osiris and the Egyptian Resurrection", vol. II (British Museum, 1911).

17. ***The Pyramids at Evening.*** From the illustration in the *National Geographic Magazine*, vol. XXXI, p. 272.

Sources of Documents Quoted in Text

a. Ramses III's Domesday Book. From the translation in *Breasted*, "Ancient Records", cited *infra*, IV, §210.

b. Harmhab's Edict. From the translation in *Breasted*, ibid. III, §23.

c. Thutmose III's Instructions to Rekhmire. From the translation in *Breasted*, ibid. II, §§666-670.

d. Ramses II's Treaty with the Hittites. From the translation in *Breasted*, ibid. III, p. 163.

e. Will of Uah. From the translation in Griffith, cited *supra.*

f. Bond for Release of a Jail-prisoner. From the French translation in *Sottas*, cited *supra.*

g. Marriage-contract. From the translation in *Spiegelberg*, cited *supra.*

h. Diodorus. MS. translation of the Greek and Latin texts in Wesseling's edition of Diodorus' "Bibliotheca Historica", book I, par. LXXV (ed. 1793, vol. I, p. 224).

i. Court Record. From a MS. translation furnished by Dr. *T. George Allen*, Oriental Institute of the University of Chicago.

j. Lawsuit of Mes v. Khay. From the translation in *Alan H. Gardiner*, "Untersuchungen zur Geschichte und Altertumskunde Aegyptens" (Leipzig, 1905, J. C. Hinrichs), as reproduced in *Kocourek* and *Wigmore*, "Sources of Ancient and Primitive Law" (Evolution of Law Series, vol. I, Boston, 1915, Little, Brown & Co.).

k. Duties of the Chief Judge. Adapted from the translation in ***Breasted***, ibid. II, pp. 675-715.

l. Ramses III's Special High Commission. From the translation in ***Breasted***, ibid. IV, p. 212.

m. Trial of the Tomb-Robbers. From the translation in ***Breasted***, ibid. IV, §§510-534.

n. Plea of Not Guilty. From the translation in ***Budge***, "Osiris", cited ***supra***.

General References

James Henry Breasted, "A History of Egypt" (London, 2d ed. 1909); "Ancient Records of Egypt", 5 vols. 1907 (University of Chicago Press).

W. Flinders Petrie, "Social Life in Ancient Egypt" (1923).

E. Revillout, "Les obligations en droit égyptien, comparé aux autres droits de l'antiquité" (Paris, 1886); "Précis du droit Egyptien comparé aux autres droits de l'antiquité" (Paris, 2 vols. 1903); and other later titles by this author.

Edith J. Simcox, "Primitive Civilizations; or, Outlines of the History of Ownership in Archaic Communities", Book I, "Ownership in Egypt" (Macmillan, 2 vols., 1894).



THE MESOPOTAMIAN LEGAL SYSTEM

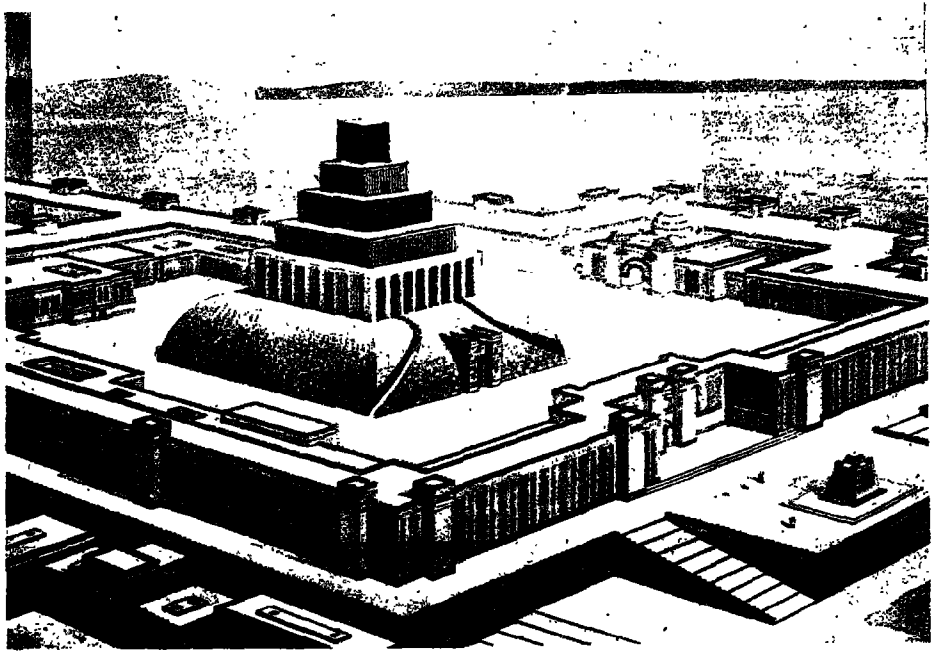
II

The Mesopotamian Legal System

1. Babylonia and Assyria—their mixed stocks.
2. Development of literature and commerce —Cuneiform records of commerce and law.
3. Deed of storehouse—Warranty deed—Stone landmark—Marriage-settlement.
4. Commercial transactions—Promissory note payable to bearer—Banking records—Partnership records.
5. Judicial system—Judgment in a boundary suit—Lawsuit over a will—Action for unpaid purchase-money—Action by a widow claiming land—Petition of an accused under arrest.
6. Legislation—Sumerian code—Parable of the prodigal son—Hammurabi code—Codes of Hammurabi, Assur, and Deuteronomy, compared.
7. Daniel and the Handwriting on the Wall—Fall of Babylon.



II. 1—Map of the Mesopotamian Regions
at the period of the Assyrian Empire



II. 2—A Temple Tower of Babylon
The towers, or ziggurats, of Mesopotamia, had a different color for each level

II

The Mesopotamian Legal System

THE civilization of Mesopotamia,[1] the region lying between the watersheds of the Euphrates and the Tigris, was centered about Babylon, in the southern portion known as Chaldea, and also about Nineveh, in Assyria, the northern portion. Assyria was younger than Babylonia, and yet contemporary; and in the varying phases of their contiguous growth and rivalry (comparable perhaps to the relations of Scotland and England) they represent a single system, in the broad outlines of legal history.

Mesopotamian architecture was of the massive and towering type, rising loftily from the wide level plains beneath; and the tower of Babel,[2] whose top was to reach unto heaven (as the Scripture narrative reports), was only one of many similar structures devised by Babylonian architects.

The civilization of Mesopotamia was built up successively from several groups of highly talented peoples of distinct races,—first, a Turanian race, called Sumerians; then a Semitic stock; and the Semitic stock developed several branches of its own,—Akkadians at Babylon, Assyrians at Nineveh, and Arameans.

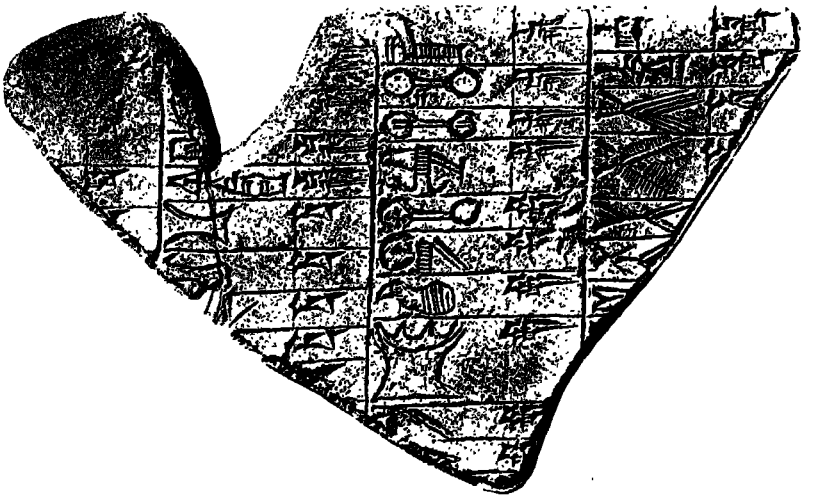
The legal system emerges in history by perhaps 4000

years before Christ. It endured amidst successive waves of conquest from east, north, and west, absorbing one after another. It lost its racial independence under the Persians, about 500 years before Christ, and disappeared under the Greeks, about 100 years before Christ.

2. Mesopotamia was notable for two things: first, for its early development of original and elaborate forms of art and literature, and the diffusion of those attainments among all Semitic peoples; and secondly, for its specially high development of commerce, and thus, distinctively, of commercial custom and law. The records of law, commerce, and literature, in vast quantities of thousands, have been found well preserved in libraries or archives, and in such bulk that modern philologists have yet not even had time to study and translate more than a small portion of them.

These records are virtually all in cuneiform script. This script is chiefly a sign-language; that is, each character represents a whole word or idea; thus, there were several thousands to learn, as in Chinese. This cuneiform script was itself a development from the pictograph, or hieroglyph, by abbreviation;[3] and dictionaries were in use, showing the pictograph at the left and the cuneiform at the right of each column. Still later, the Aramean branch of the Semites brought into use a genuine alpha-

2. *Cuneiform Records*



II. 3—EARLY PICTOGRAPH
This is a leaf of a dictionary showing the equivalents of the pictograph in cuneiform

bet,—that is, a script in which each character represents one of the few elemental sounds or syllables which when combined form all words; and this alphabet was one forerunner of the modern European alphabet. But during the whole period of Babylonia and Assyria, the cuneiform was the vehicle of all records.

These records were chiefly made on small tablets, or biscuits, of hard clay, usually some three inches long, two inches wide, and one inch thick, inscribed by a wooden stylograph with wedge-shaped, or cuneiform, characters; this document here shown is a deed of a warehouse, some

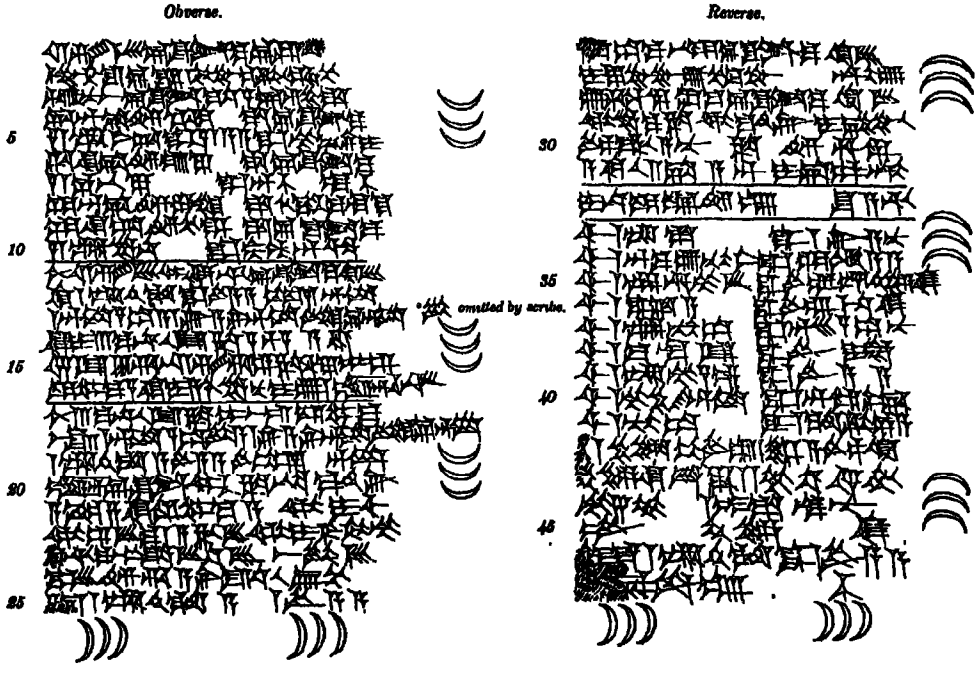
II 4—Dirk or Warhorse, B C 600

600 years B. C.[4] Both front and back of the tablet were used for the writing; and the half-moon shaped lines on the two narrow margins of the tablet were made by the parties' thumb-nails, impressed perhaps for identification. Modern archaeologists re-transcribe these tablets in standard script,[5] capable of being set up in printed type; and thus other scholars, all over the world, may share in these studies.

3. In these Mesopotamian deeds, lawyers of today will recognize, in germ, the standard provisions of our own conveyancing practice. In this deed, for example, are mentioned the description of premises, the total area, the parties' names, the price, the recital of price received, the kind of title conveyed:[a]

[*Deed of a Storehouse.*] "A 12-reed storehouse, a finished house having a built-in threshold, a covered house with a door having a firm bolt, of the bright storehouse of Ezida; on the upper north side adjoining the storehouse of Bel-epush, son of Apla, son of Mubanni; on the lower south side adjoining the storehouse of Etillu, son of Marduk-abishu; on the upper west side along the Tarrabshu road; on the lower eastern side adjoining the storehouse of Nabu-iddina, son of Arkat-Damqu. Total 12 reeds is the measurement of that storehouse.

"With Bel-uballit, son of Amèlai, the riqqu of Marduk, Marduk-kudurri-usur, son of Irani-Marduk, the Tu officer of the house of Marduk, according to 3 minas, 10 shekels of silver for the half of the field, 15¾ shekels, and 2 gerahs of silver and 5 kors of dates which were thrown in, he fixed as his full price. Total 3 minas, 10 shekels of silver and 5 kors of dates, the full price of his storehouse, Bel-



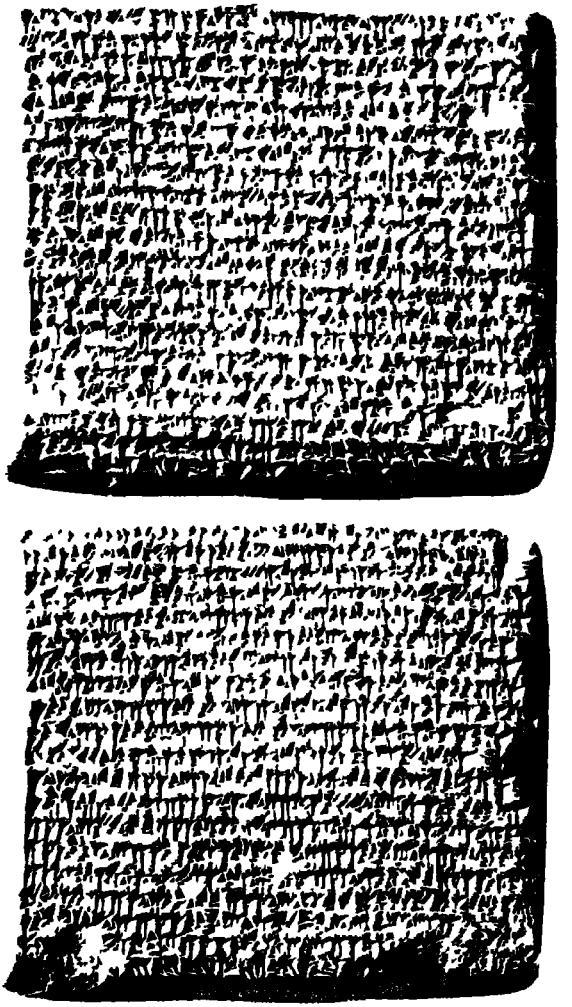
II. 5—Deed of Warehouse, Re-Written

uballit, son of Apla, the riqqu officer of Marduk, received from Marduk-kudurri-usur, son of Irani-Marduk, the Tu officer of the house of Marduk. The buyer has a fee simple, there shall be no recourse. They shall not return and complain to one another."

Some of these deeds were elaborate in their terms, and required tablets larger than the ordinary ones.[a] For example, in the deed here shown (about B. C. 300) the distinction between a quitclaim-deed and a warranty-deed had been already devised; this document ends with a clause which not only warrants the title and engages to pay a multiple penalty for a breach of the warranty, but brings in a third person as surety for the grantor's performance:[b]

[*Warranty Deed.*] "The money, namely, 6 shekels, the full price of said estate, Anu-belzer, received from Ia; he has been paid. If a claim is established against said estate, Anu-belzer the seller of the estate, and Anu-apaliddannu his brother, sons of Anu-ab-usur, shall make good twelve fold, and shall pay to Ia for future time. They bear responsibility for one another for the guaranty of said estate to Ia, for future time. That estate belongs to Ia the daughter of Nana-iddin, the wife of Ribat-Anu, the son of Labashi, the builder, for future time."

But, besides the deed itself, a stone landmark or record is frequently found. The stone was set up on the plot of land, and on the stone was inscribed the description of the plot, the names of grantor and grantee, and a warning against adverse claims. This record-stone was not itself the source of title; but its precise relation to the original deed has not yet been clearly ascertained. Here is an



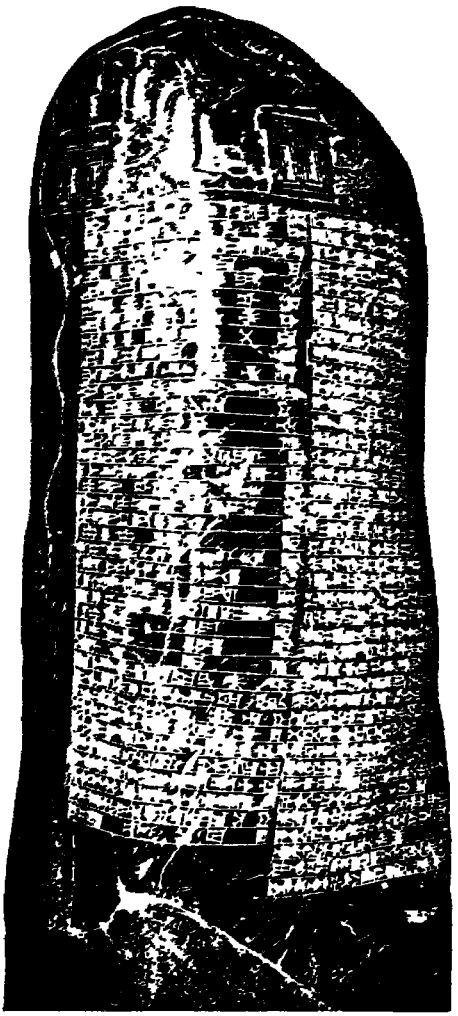
II. 6—WARRANTY-DEED, B C. 300
The distinction between a quitclaim-deed and a warranty-deed had already been devised

example from about B. C. 1100;[7] it reads thus, in condensed translation:[c]

[*Boundary-Stone.*] "This stone is named Perpetual Fixer of Landmark. One acre of corn-land, rated at 5 bins of seed, lying along the Baddar Canal and Khanbi estate, bounded by Khanbi estate on the north, by Imbiati estate on the south, by Khanbi estate on the west, and by the canal bank on the east, bought from Amel Enlil by Marduk-nasir and surveyed by Shapiku, for the price of 1 chariot value 100 shekels silver, 1 western ass value 30 shekels silver, 2 saddles value 50 shekels silver, 1 ox value 30 shekels silver [etc., etc.] If any agent or official of the said Khanbi estate shall lay claim to or take this land or shall wrongfully reclaim it or transfer it to any other party, or shall dispute this grant from the king, or shall send any fool or blind man or ignorant person to remove or destroy or hide this landmark, may the great gods curse him with incurable evil. May Shamash judge of heaven smite his countenance. May his posterity perish among the people. This stone is named Perpetual Fixer of Landmark."

These Mesopotamian documents range over every variety of legal transaction,—deed, lease, loan, sale, deposit, bill of lading, adoption, partition, agency, partnership, marriage-contract, and other familiar types. Here, for example, is a marriage-settlement, about B. C. 600, providing carefully in three contingencies for descent of the property as between the children of the first and the second wife:[d]

[*Marriage-Settlement.*] "In the second year of Nabopolassar, king of Babylon, spoke Nabu-zer-kit-lishir, son of Kudurru, son of as follows: 'I have no child, [though I have a wife]; I



II. 7—Stone Landmark Pillar, B. C. 1100

The stone bears the description of the plot, the names of grantor and grantee, and a warning against adverse claims

wish a child; Kulla, thy daughter, give me as wife.' Bel-ikisha hearkened to Nabu-zer-kit-lishir, and Kulla, his daughter, a virgin, he gave him in marriage. In the day that Esagila-banata, his first wife, shall bear a child, two thirds of the estate shall be for her. In the day that Kulla shall bear a child one third of the estate of Nabu-zer-kit-lishir shall be for her. In the day that Esagila-banata childless dies, while Kulla has children, the entire estate of Nabu-zer-kit-lishir, in city and country, whatever there is, shall be for Kulla and her children.

"Witnesses: Asharidu, son of Piru, son of Shanishishu, Marduk-zer-ibni, son of Sukhaa. Document scribe: Mushezib-Marduk, son of Raba-sa-Addu. Babylon, month of Iyyar, fourteenth day, second year of Nabopolassar, king of Babylon."

4. The most advanced ideas in commercial law had already been reached in Mesopotamian transactions. Most remarkably, we find, as early as King Hammurabi's period, a promissory note payable to bearer, dated about B. C. 2100: it is the oldest negotiable instrument in the world, now known to us:[e]

[*Note Payable to Bearer.*] "5 shekels of silver, at the usual rate of interest, loaned by the Temple of Shamash and by I. Company, to Idin and his wife, are payable with interest on sight of the payors at the market-place to the bearer of this instrument."

And yet this fertile idea of transferability to bearer does not appear in European commercial law until the late middle ages.

Banking in Babylonia was highly developed. In recent years have been unearthed the records of one of

the greatest banking-houses in history, the house of Yegibi (or Jacob) and Sons, extending continuously through four successive centuries from B. C. 700 to 300; and their records show that the use of instruments payable to order was well known; as in the following instrument dating about B. C. 500:[f]

[*Paper Payable to Order.*] "3 gold minae, in specie, are receivable by B. from M. per note. Upon B's order, N. has collected from M. the amount with interest due under this note. N. has surrendered to M. the note calling for 3 gold minae receivable by B. from M."

Naturally, in so active and mature a commercial world, all varieties of agency, brokerage, and partnership (though not the share-corporation) are found represented in the recorded transactions. A few selections from the field of partnership will illustrate the wide range of typical instruments. The celebrated banking firm of Jacob (or, Yegibi), above-mentioned, through successive generations, figures in many of these partnership ventures, placing its capital with small undertakers for an agreed share of the profits. First we may look at a partnership undertaking from the reign of Darius:[g]

[*Partnership Contract:*] "50 bushels of dates, belonging to Marduk-nasir-aplu, son of Itti-marduk-balatu, son of Igibi, and 50 bushels of dates, belonging to Bil-ikisha, son of Labashi, son of, have been put in together as partnership capital. Whatever profit, in town and country, shall be made on these 100

bushels of dates shall be shared. The cottage at Borsippa located adjacent to the lot of, foreman of [the first partner] Marduk-nasir-aplu and his brother, has been assigned to [the second partner] Bil-ikisha, at a yearly rental of ½ mina of money and one calf; the said Bil-ikisha to have possession of it for one year, and the rental to be paid out of the [first partner's] capital. The tools which [the first partner] Marduk-nasir-aplu will deliver to [the second partner] Bil-ikisha, he will deliver back at the end of the year, and he will also pay the taxes. Each party has a counterpart of this instrument. The south building is in possession of [the first partner] Marduk-nasir-aplu."

When the partnership-venture was completed, an instrument was signed, reciting an accounting, acknowledging the division of the profits, and mutually releasing from all claims; the following document, from the time of Nebuchadrezzar (about B. C. 600) is typical of scores:[h]

[*Partnership Release:*] "As to the business-capital used in partnership between Nabu-kin-aplu and his son Nabu-bil-shunu, and Shula son of Zir-ukin, and Mushizib-bil, ... official, from the 8th year of Nabu-aplu-usur, king of Babylon, to the 18th year of Nabu-kudur-usur, king of Babylon: An accounting has been had by the parties on oath in the presence of the judges, and it was agreed that 50 shekels gold are to be received by [the first-named two parties] Nabu-bil-shunu and his father Nabu-kin-aplu. No recourse or claim will be made. The partnership-venture is dissolved, and each party will go his own way. In the name of the gods, each party has made oath, and the accounting is finished. The original instruments executed by the parties have been cancelled."

But the Babylonian partnerships, like other such ventures elsewhere, were not always peacefully settled by

mutual accord; for occasionally a disputed account led to litigation. The following incomplete record (dating more than 1500 years before the above two) begins with a formal oath of the defendant to his story of the facts; and this oath is accepted by the court as decisory; the suit had been brought by the sons of one deceased partner against the son and the brother of the other deceased partner, and claimed an accounting:[1]

[*Partnership Lawsuit:*] ". Afterwards [the defendant] Varad-shin, son of Sin-nasir, mounting the altar and touching the banner of the god Shamash, made oath against [the plaintiffs] Sin-ikisham and his brother, sons of Ubar-shamash (the brother of [the defendant's] father having already made oath), as follows:

'"With the moneys appropriated from the partnership fund by my father Sin-nasir and [the plaintiffs' father] Ubar-shamash, they transacted business, after making a trading journey. Then, after the death of the plaintiffs' father Ubar-shamash, they came to my father Sin-nasir [and asked for an accounting], whereon he took from his own chest the purse of gold containing the money-proceeds of the venture, and restored it to the partnership-fund. It was not with any moneys from the partnership purse that my father bought any land or house; the house [in question] was bought with his own private assets. No other partnership moneys than the above-named in the partnership purse remained in the hands of my father Sin-nasir, nor came to my hands. Whatever private moneys were left in my father's house [on his death] were applied by me to pay his own outstanding debts.'

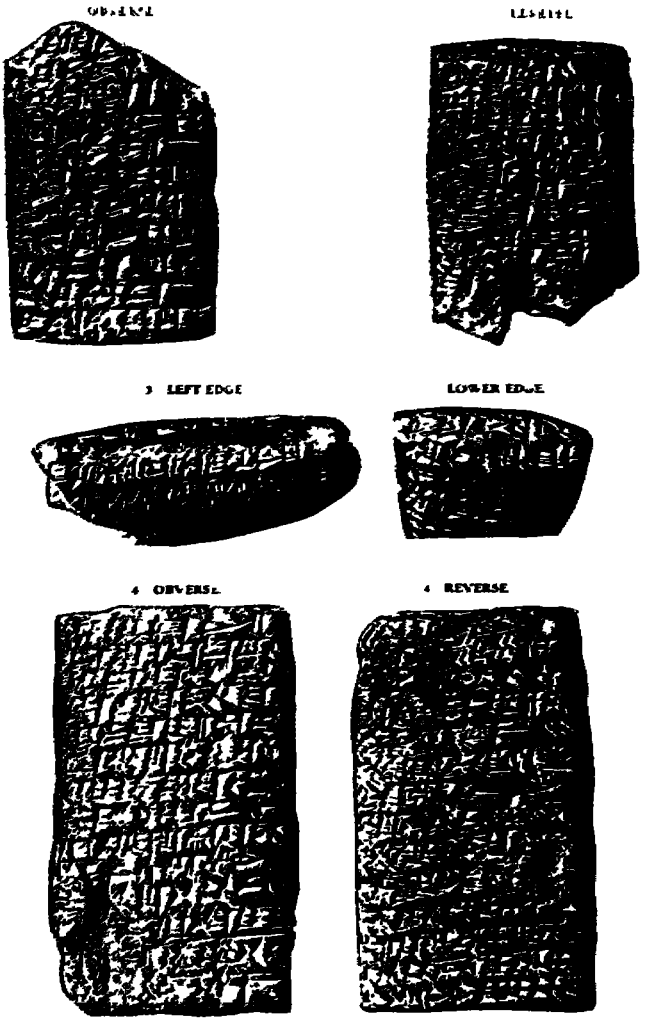
"Proceedings had in the Shamash Temple before six judges. After oaths taken, each party executed a document releasing all further claim."

5. *Judicial Proceedings*

5. There are copious documents showing a judicial system in full operation, with professional judges, professional clerks, and notaries, employing various standard forms of writs and other legal process. Among other discoveries is this judgment, dating some 2000 years B. C.,[8] in a suit over a boundary-wall; in this record the title is awarded to one party, and the opponent is forbidden thereafter to dispute the title:[j]

[*Judgment in a Land-Action.*] "Action claiming a wall, brought by Ibkusin, son of Sharrum-Shamash, against Waradsin. The men appointed to report inspected the wall. The distance from the wall of Nurgir to the wall of Waradsin being ½ rod 2 cubits [etc., etc.], the wall was proclaimed to be the property of Waradsin, in the court of Sippar at Sharrum. Forever hereafter, Ibkusin shall make no claim to this wall of Waradsin. The spirits of the gods Shamash, Aja, Marduk, and of the king Samsuiluna, are invoked. . . . [Follow the names of six witnesses to this document.]"

The king was the fountain of justice, receiving the law from divine guidance. But under King Hammurabi (about B. C. 2100) his deputized administration of justice passed from the hands of the royal priest-class, in the temples, to a body of royal secular judges, sitting commonly at the great gate and market-place of the city (as of yore also in Hebrew annals). This change was perhaps the consequence of the union of North and South Babylonia and the enactment of a common code for the united kingdom. The king continued to do justice either in person



II. 8—Judicial Decision, B. C. 2000
The title is awarded to one party, and the other is forbidden thereafter to dispute it



II. 9—King Sargon and His Chief Justice

(in some classes of cases) or through his prime minister and chief justiciary,[9] on some principle of appeal.

But below him was a system of courts. In Babylon is found a chief magistrate (sometimes sitting with the chief magistrate of another metropolis, when the parties were of diverse domicile), and occasionally the governor of Babylon acts as judge. In the towns and villages, the mayor, presiding over a bench of elders, dispensed local justice. Clerks of courts recorded on the clay tablets a concise minute of the proceedings.

In the following record (dating about B. C. 2060) of a lawsuit over a will, it would seem that the instruments at issue, literally "contracts of heirship", were in law rather what we should call "testaments", so that the later instrument revoked and annulled the earlier one:[k]

[*Lawsuit over a Will:*] "An estate of 1 acre 10 rods of arable land at Bit-agargina adjacent to Ibku-adad, and 1-12 acre 25 rods of arable land, in the fields of the goddess Gula, adjacent to Iluni, were disposed of [to defendants] by Apil-ilishu, son of who claimed title under a contract of heirship of a certain date; part of the land being sold for money, and part exchanged. [The plaintiff] Shumum-ilishi (son of Nannar-idinnam), eldest brother [of the above grantor], who claimed the land under an heirship-contract of earlier date, producing the contract, then entered complaint before the judges against Ninib-mushalim, the , son of Nannar-tum, who had bought for money from [the above-named claimant] Apil-ilishu the plot of land at Bit-agargina, and against Sag-ninbizu, son of Ili-avele, who had received by exchange the plot of land at the Gula temple.

"After the judges had verified the earlier heirship-contract, the defendant [grantee] Ninib-mushalim thus pleaded in person: 'After the execution of this earlier heirship-contract produced by you the plaintiff, a later heirship-contract was executed [by the ancestor] to [the above-named] Apil-ilishu [my grantor], for the plots of land at Bit-agargina and at the Gula temple. Witnesses to this transaction are present; summon them and hear their testimony.' Thus he pleaded.

"Thereupon came forward the witnesses to the later contract, namely, Sag-ninibizu, son of Ili-avele, Su-enkiga, son of Nannar-adab, Ellitum, son of Ninib-medu, and Idin-ishtar, son of Lugal-egen. After the judges had heard their testimony to the later heirship-contract, the judges ordered them to make oath before [the god] Shamash, exalted source of all Light.

"Thereupon [the plaintiff] Shumum-ilishi voluntarily announced that he would waive these witnesses' performance of the oath before Shamash, exalted source of all Light. And because he waived the performance of the oath before Shamash, exalted source of all Light, then [the defendant] by consent of [the plaintiff] Shumum-ilishi, paid over to the said Shumum-ilishi 1½ shekels [in settlement of the case].

"Hereafter no claim will be made by Shumum-ilishi against Ninib-mushalim for the land at Bit-agargina, nor against Sag-ninbizu for the land at the Gula temple. Nor will Ninib-mushalim make claim against Shumum-ilishi for the 1½ silver shekels,

"Oath to this was made by both before the King.

"Eight witnesses [with their signatures].

"On the 28th day of the month Elulum in the year in which King Samsu-iluna set up the two golden thrones for the shrines of Marduk and Zarpanitum."

In any of the surviving European systems, the lapse

of a thousand years has given rise to successive new phases of thought, and thus has witnessed radical changes both in the procedural methods and in the style of the records. But in Mesopotamian annals, strangely enough, it was otherwise. After reaching a mature development by B. C. 2500 or earlier, the system exhibits little noticeable change. From the time of Hammurabi and his immediate predecessors, to the period of Darius and his immediate successors, nearly two thousand years, both method and style, as revealed in the records, seem to have remained virtually static.

The fullest extant record showing the normal course of proceedings in a lawsuit is one dating from about B. C. 2000, in the city of Babylon and the reign of Ammi-ditana; the plaintiff first apparently claims title to a piece of land; then the defendant sets up the execution of the deed; then the plaintiff rests on the allegation of non-payment of price: then the defendant joins issue on this allegation; and the court finds for the defendant, and requires the plaintiff to execute a release:[1]

". [Action for non-payment of sale-price of land, by Ilusha-negal *vs.* Addi-liblut; opening lines broken off] 1 rod of improved house-lot [being land], which Ilusha-negal, [the plaintiff,] priestess, daughter of Ea-ellazu, had bought from Belizunu, priestess of Zamama, daughter of, in the year when King Abi-eshuh, being 1 rod of house-lot adjacent on

one side to the house of Ili-ikisha son of Idin-shamash, and on the other side to the house of Ili-ikisha son of Itti-marduk-balatu, and on the front to the house of Ili-ikisha son of Idin-shamash, and on the rear to the house of Nabi-ilishu.

[*Defendant Pleads.*] "'From the priestess Ilusha-negal daughter of Ea-ellazu, for 15 silver shekels, my wife Belizunu [a different person from the above-named B.], priestess of Marduk, and daughter of, did indeed buy the lot in the year when King Ammi-ditana, and I received the deeds duly executed by seal. And I have as witness Ili-ikisha above-named, possessor by inheritance of the two lots adjacent, who affixed his seal. But now the priestess Ilishu-negal, daughter of Ea-ellazu, is claiming this 1 rod of house-lot, although the executed deed bears her seal.'

[*Plaintiff Pleads.*] "After he had thus pleaded, the priestess Ilusha-negal, daughter of Ea-ellazu, answered thus in person: 'When the 1 rod of improved house-lot, adjacent to 2 rods of house-lot, which I had bought from Belizunu, priestess of Zamama, was sold by me to Belizunu, [the other B.] priestess of Marduk, wife of defendant Addi-liblut, for 15 silver shekels, she did not pay me the 15 silver shekels.' Thus the plaintiff replied.

[*Evidence.*] "Then the judges called upon [the plaintiff] Ilusha-negal to produce either witnesses that the [defendant] priestess Belizunu had not paid the money, or an instrument of debt for the unpaid price, but she did not produce them, for none came. Then [the defendant] Addi-liblut produced the executed deed for the 1 rod of house-lot, and the judges read it, and called for the testimony of the witnesses signing the executed deed, and they in the presence of the judges stated that the 15 shekels, the price for the 1 rod of house-lot, had been received by [the plaintiff] Ilusha-negal, and that she had acknowledged receipt.

[*Judgment.*] "After the judges had examined the facts, they imposed a fine on [the plaintiff] the priestess Ilusha-negal, daughter

of Ea-ellazu, because she had denied her authentic seal; and directed that she sign the following release of claim:

[*Release.*] "'Hereafter the 1 rod of improved house-lot, adjacent to the house of Ili-ikisha son of Idin-shamash and to the house of Ili-ikisha son of Itti-marduk-balatu and having at the front the house of Ili-ikisha son of Idin-shamash and at the rear the house of Nabi-ilishu, is the purchased property of Belizunu priestess of Marduk, wife of Addi-liblut; and Ilusha-negal, her children, her brother, and her other kin will make no claim against Belizunu and her husband Addi-liblut.'

[*Certificate.*] "This they swore to by [the god] Marduk and the king Ammi-ditana, in the presence of . . . [here follow the names and titles of eight judges and a chief judge].

"Certified by Gimil-marduk, clerk of court, and Belsunu, assistant.

[*Seals.*] . . . [here follow eleven seals, first the plaintiff, then seven of the Judges, then two other persons, then the plaintiff again.]"

From the later period, about B. C. 550, we have a record of a lawsuit (perhaps an appeal) which raises points of law readily appreciable under our own modern law,—the case of Bunanitu *vs.* Akabu-ilu.[10] A widow sues her brother-in-law. The widow and her husband, having no children, had adopted a boy; afterwards they bought land, paying for it in part with the wife's dowry. On the husband's death, the husband's brother claimed the estate, on the ground (apparently) that the husband had died without male issue. The widow maintained that the land belonged to the adopted child and herself. The



II. 10—Lawsuit of Bunanitu vs. Akabu-Ilu, about B. C. 630
A widow sues her brother-in-law for land claimed
by inheritance and obtains judgment

court, consisting of six judges, decided in her favor. The record of this suit of Bunanitu *vs.* Akabu-ilu runs thus:[m]

[*Lawsuit of Bunanitu v. Akabu-ilu.*] "Bunanitu, daughter of Hariza, comes to the judges of Nabonidus, king of Babylon, and says:

[*Plaintiff's Pleading.*] "'Bin-Addu-natan, son of Nikbata, had me to wife, receiving 3 silver mana as dowry, and I bore to him one daughter. I and Bin-Addu-natan, my husband, traded with the money of my dowry, and then with 9⅓ silver mana, including 2½ silver mana borrowed from Iddin-Marduk, we bought 8 rods of land, and a ruined house, in a large estate in Borsippa. We made this purchase jointly, in the fourth year of Nabonidus, king of Babylon. Now my dowry had been in the hands of Bin-Addu-natan, my husband. But I asked for it, and Bin-Addu-natan, in the kindness of his heart, deeded and entrusted to me for future maintenance the 8 rods of land and that house in Borsippa. Then in the fifth year of Nabonidus, king of Babylon, I and Bin-Addu-natan, my husband, adopted Bin-Addu-amara as our son, and executed a declaration of adoption and provided that the dowry of my daughter Nubta, when she would marry the adopted son, was to be 2 mana 10 shekels of silver and the furniture of a house. Fate then took my husband. On account of this, [his brother], Akabu-ilu, son of my father-in-law, now claims to inherit the house and everything which my husband had deeded and entrusted to me, and also claims the slave Nabu-nur-ili whom we had bought by the agent, Nabu-ahi-iddin, for money. I have brought the case to you for judgment.'

[*Judgment.*] "The Judges heard the parties' statements, and examined the tablets and documents which Bunanitu produced in court. They held that Akabu-ilu [the brother] had no title to the house in Borsippa, which had been entrusted to [the wife] Bunanitu in place of her dowry; nor to the slave Nabu-nur-ili, whom she and

her husband had bought for silver; nor to any property of [his brother] Bin-Addu-natan. [The widow] Bunanitu and the son Bin-Addu-amara, pursuant to the terms of their tablets, are to possess them. Iddin-Marduk is to be repaid the 2½ silver mana which he had loaned as part of the purchase price of that house, and to discharge his claim. Then [the widow] Bunanitu is to be repaid the 3½ mana, her dowry. [The daughter] Nubta, besides her own property, is to have the slave Nabu-nur-ili, according to the agreement of her father.

"Judgment entered accordingly."

Of criminal trials (as we call them; for our sharp distinction between criminal and civil cases is not found in the Oriental systems, nor in the early stages of any system) no satisfactory records have yet been deciphered. But interesting sidelights on criminal justice are occasionally revealed in the copious annals of lay literature.[11] The human aspect of the processes of justice in domestic contentions may be seen in this petition from an accused person, in which he beseeches the king's personal attention to right his wrongs and vindicate his reputation:[n]

[*Appeal of an Accused.*] "To the King my Lord thy servant Nebo-Balatzu-ikbi sends greeting. May the gods Nebo and Marduk to the King my Lord be propitious! and may the god who is the head of heaven and earth prolong thy life!

"Have I not once and twice besought the King my Lord? Yet no one has sent to me news from Babylonia. Is the countenance of the King turned away from me? and have I committed some crime against the King my Lord? No! I have not committed any crime against the King my Lord.



II. 11—Audience Hall at Nineveh
"A certain man, my accuser, entered the palace boldly; a criminal charge against me he raised; fetters on my hands he placed"

5. *Judicial Proceedings*

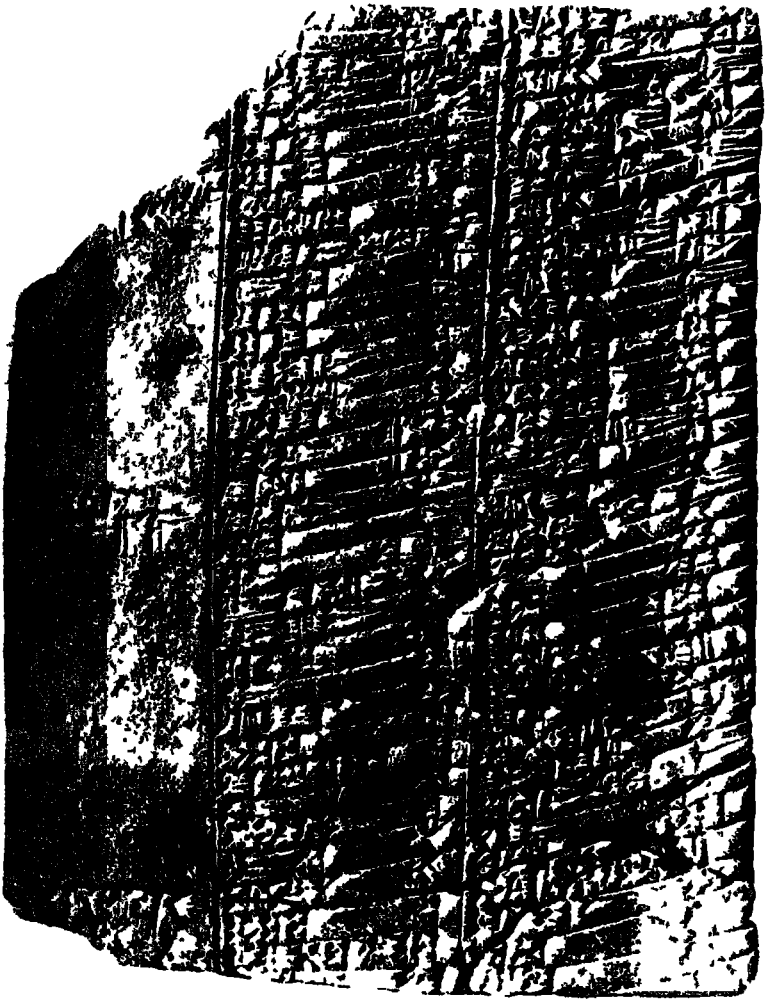
"When trustworthy witnesses had assembled and I had declared my fidelity to the King before a public notary, a certain man, my accuser, entered the palace boldly; a criminal charge against me he raised; fetters on my hands he placed, and said: 'In the presence of all these people who are here assembled, as prisoner of my Lord the King, I arrest you!' All that day I lay flat on my face upon my bed. The soldiers who passed by my bed, out of ill-will, none gave me food for my mouth; hunger and emptiness fell upon me. When evening came, I rose up, and I muffled my fetters, and I passed by in front of the guard whom the King my Lord had set in that place to guard it. How I was liberated I will now tell the King. Some soldiers, strangers to me, came in thither, who broke off from me the King's fetters, and with idle words spoke against the King (the King will understand me). For two days, for money, to sustain my life they brought me of their food, for my portion, and for my nourishment, and they spoke words of disrespect against the King my Lord, that are not decorous that the King my Lord should know them; their full speech I conceal, for it were not meet for the eyes of the King. (Sarludaru will tell me the will of the King.) Moreover, a certain villain of the land of Sumir, who never broke my bread, this man seduced the daughter of Babilai, who is the son of one of the Priests of the Sun. To the King my Lord I wrote word of the crime, and one at a time, the magistrate and the prosecuting officer took it by turns to adjudicate, for the King on purpose had mingled them so, to judge my household; they sent writings in multitudes, letter after letter.

"When Sarludaru to the office of Exchequer Judge had been appointed, the prosecuting officer demanded judgment, and having thrown the men of my household into prison, he gave them to Sarludaru. When he came to judge, he said: 'Fear not, my man! Needlessly thou fearest.' And I till the time of the evening meal continued talking with him. Meanwhile, the girl had been carried off; but how she left the house I saw not; I heard not; and I knew not

who carried her off, not in the least! for in the crowd of servants of the King my Lord, with whom she had been talking, she had remained behind. O Marduk! whoever has concealed her flight, I have as yet obtained no news of him, but, O Lord of Kings! I will urge with haste the search for her present dwelling-place. The prosecuting officer has annuled the criminal accusation; but that the King [himself] should judge all my family from my heart I desire!"

6. The legislation of Babylonia has already been found, in large part. One of the earliest peoples occupying Babylonia was the Sumerians, a non-Semitic people; and a few years ago an American scholar discovered and deciphered a fragment of one of their primitive enactments.[12] It is inscribed on a clay tablet 1½ feet square, and dates from possibly 2400 years B. C. The characters of this inscription have therefore the solemn impressiveness of being the oldest code-text in the world yet discovered.

Its added interest is that it happens to contain, among its seven paragraphs, the rule which explains the parable of the Prodigal Son, told by Jesus of Nazareth to a Semitic people more than two thousand years later: "And the younger son said to his father, 'Father, give me the portion of goods that falleth to me'. And the father divided unto them his estate. And not many days after, the younger son gathered all together, and took his journey into a foreign land." Now this act of partition, as the Sumerian Code shows, was no more than the lawful



II 12—SUMERIAN CODE
The oldest code-text in the world, yet discovered

proceeding of emancipation, as a comparison of its text will illustrate:[9]

Sumerian Code, par. 4

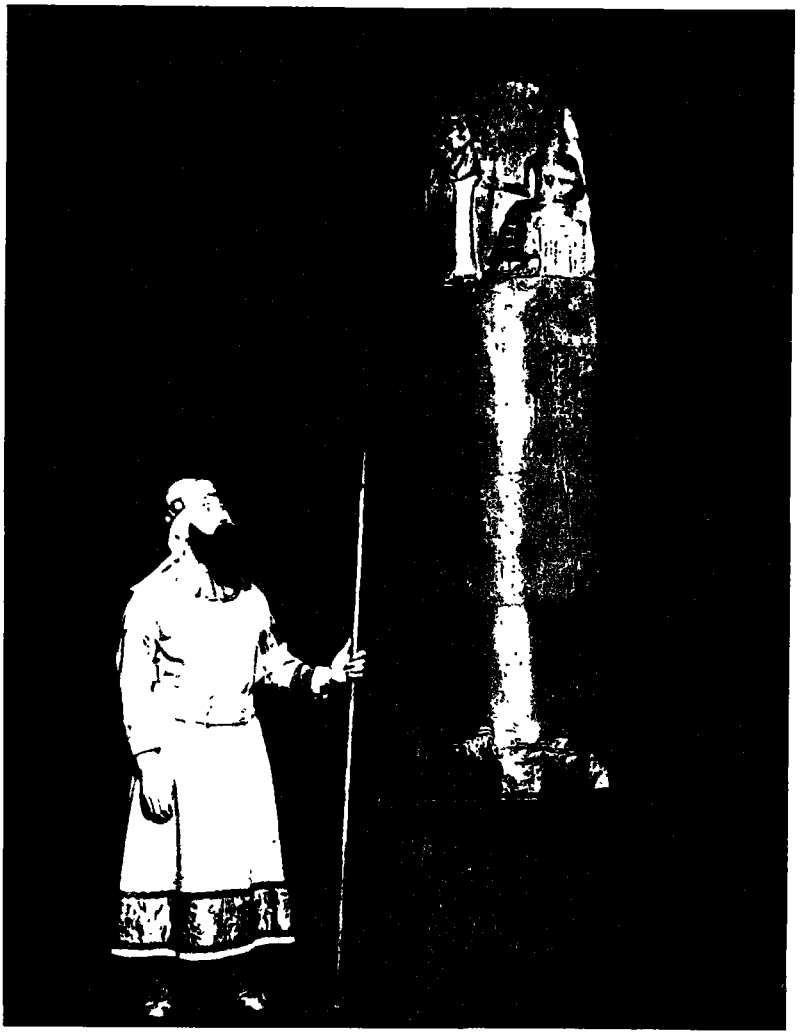
"If a son says to his father and his mother, 'Thou art not my father nor my mother', he shall abandon the house, field, plantation, and other property, but his own full portion shall be delivered to him by his father. His father and his mother shall say to him, 'Thou art not our son'; and he shall go out from the place."

Parable of the Prodigal Son (Luke, XV, 11)

"And the younger son said to his father, 'Father, give me the portion of goods that falleth to me'. And the father divided unto them his estate. And not many days after, the younger son gathered all together and took his journey into a far country."

For, in the Sumerian Code, a son may say to his parents, "Thou art no longer my father nor my mother", and the father must then deliver to him his portion of the estate. This made the son independent, but forever cut him off from further share in the home. In the parable, indeed, his father ultimately bestows on him the fatted calf. And the profound moral there is the subordination of strict legal right to the justice of the heart.

But the greatest treasure of Babylonian law is the Code of Hammurabi.[13] In this system, as in the Egyptian and the Hebrew, the Law is conceived as delivered to the King from a Divine hand. The sun-god Shamash, seated on the right, is the god of Law, whose children are Justice and Right. And the king, Hammurabi, receiving



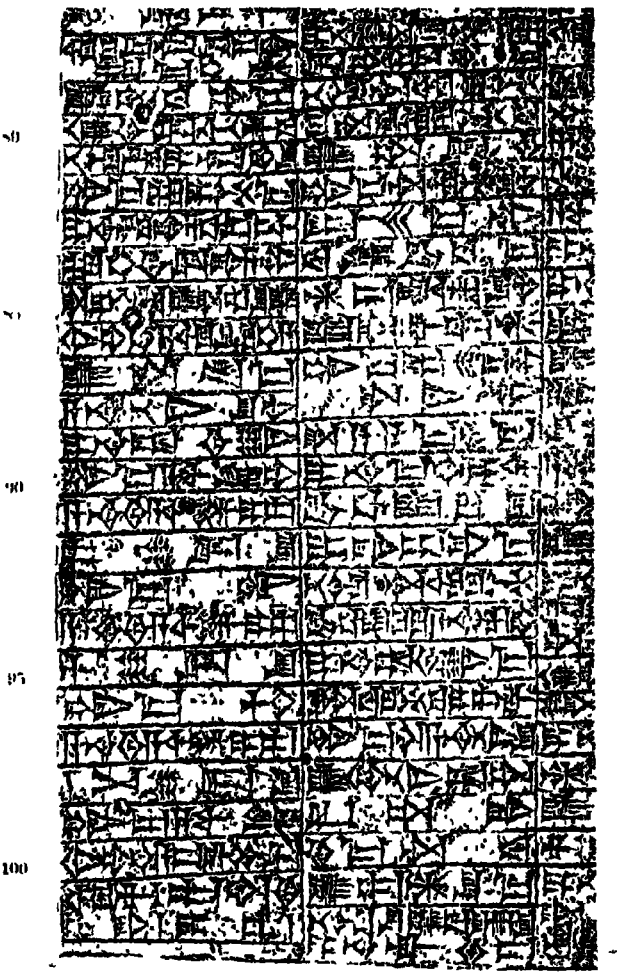
II. 13—PILLAR-CODE OF HAMMURABI
It is 8 feet high, and contains some 300 sections; a portion at the base is missing

the law from Shamash, declares that he the king has kept the strong from oppressing the weak, and has given safety to the orphan and the widow; and so, to do justice in deciding lawsuits, the king has inscribed the Law publicly, where all may come and read it, at the temple-gate of the Sun-God Shamash, where justice is dispensed.

Such is the epilogue to the famous Pillar-Code of King Hammurabi, discovered in 1902. It is eight feet high, and contains some three hundred sections. It dates about B. C. 2100. The original is in the Louvre Museum; a facsimile can be seen in Northwestern University School of Law. It is the earliest national code in the world whose (almost) full text we know, being some 1500 years older than the Hebrew Code and the Hindu Code of Manu. Its provisions have been transcribed in cuneiform type,[14] and translated into several modern languages. They range over nearly the whole scope of law,—crime, family, property, commerce.

These following passages will serve to illustrate their style:[p]

[*Hammurabi Code.*] "If a man have borrowed money of a merchant, and have given (as security) to the merchant a field to be planted with grain and sesame, and have said to him, 'Cultivate the field and reap and take for thyself the grain and sesame which is in the field,' and if the cultivator have raised grain and sesame in the field, at the time of reaping the owner of the field shall receive the



II 14—Transcription of a Part of the Pillar Code of Hammurabi

grain and sesame which is in the field, and he shall give to the merchant grain for the loan which he had received and for the interest and for the maintenance of the cultivator.

"If he give (as security) a field planted with grain, or a field planted with sesame, the owner of the field shall receive the grain or the sesame which is in the field, and he shall return the loan and its interest to the merchant.

"If he have not money to return, he shall give to the merchant grain or sesame at their market value as fixed by the king, for the loan and its interest, which he has obtained from the merchant

"If a man have borrowed money from a merchant, and his creditor had warned him to pay; and he had nought to give, and he had given over his garden already cultivated, and then had said, 'All the dates, which are produced in this garden, take for thy money,' that merchant shall not assent. The dates, which are produced in the garden, only the possessor of the garden may take; then shall he pay the merchant the money, including the interest, in accordance with his account, and the remaining dates, which are produced in the garden, shall the possessor of the garden take"

For tracing the evolution of law, the value of this Babylonian Code is incalculable; because about 1920 the discovery of another partial code (the Code of Assur), dating from the later times of Assyrian domination in Mesopotamia, about a thousand years after Hammurabi, enables us now for the first time to compare on a large scale different epochs of Semitic law. And since the full legal records of the Hebrews, another Semitic people, though more primitive, date some 500 years still later, the parallel comparison of institutions in these three adjacent



II 15—The Hanging Gardens of Babylon

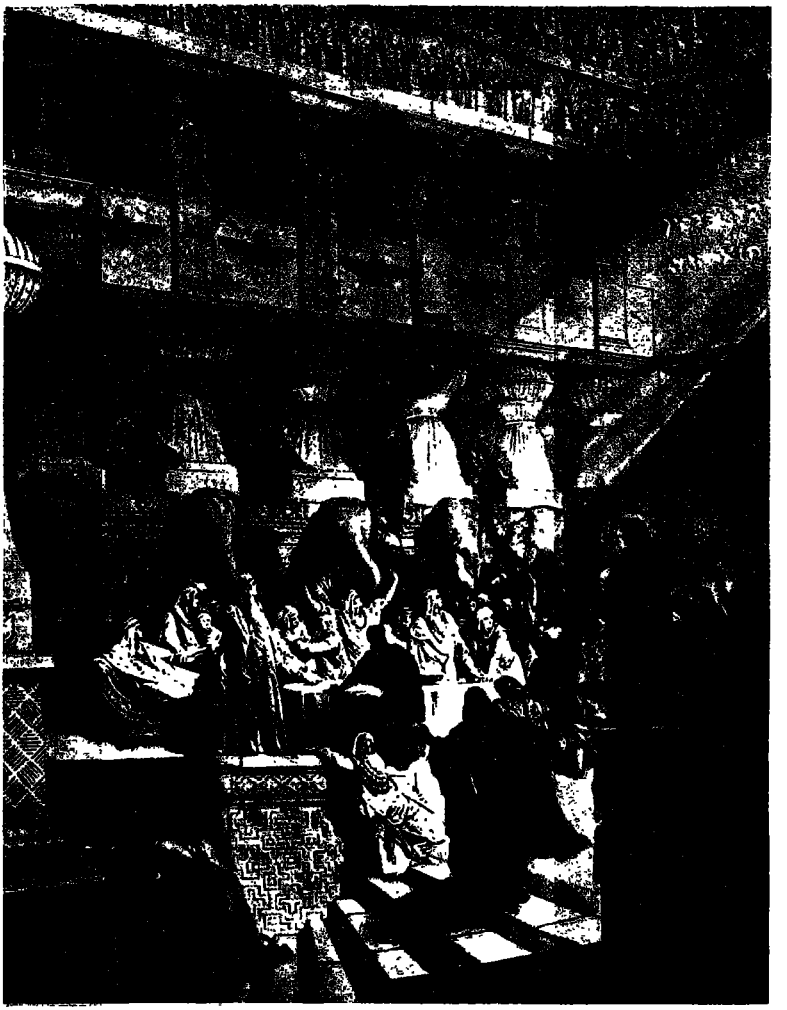
peoples is bound to illuminate the problems of legal evolution. For example, in Egypt, as we saw, the wife might by contract reserve the sole right of divorce; but in these three Semitic codes, only the husband could divorce; moreover, by the Code of Hammurabi, in the passage here shown, the husband on divorce is bound to restore to the wife her dowry; yet, by the Code of Assur, he may give her only as much as he pleases; while the Hebrew law says nothing of any payment by the husband:[q]

CODE OF HAMMURABI *Sect. 138*	CODE OF ASSUR *Col. I, Sect. 38*	DEUTERONOMY *Ch. XXIV, Verse 1*
"If a man would put away his wife who has not borne him children, he shall give her money to the amount of her marriage settlement, and he shall make good to her the dowry which she brought from her father's house, and then he may put her away."	"If a man puts away his wife, he shall give her something if he wishes to; if he does not wish to, he shall not give her anything; she shall go empty out of his house."	"When a man hath taken a wife and married her, and it come to pass that she find no favor in his eyes, because he hath found some uncleanness in her, then let him write her a bill of divorcement and give it in her hand, and send her out of his house."

7. The glories of the Babylonian kingdom made it long pre-eminent among neighboring peoples; the famous Hanging Gardens of Babylon[15] were the theme of amazed contemporary visitors, whose reports are no longer deemed incredible. But the very riches of Babylon marked it as an

object of prize for the young sturdy nations on the east now surging down from the mountains towards Mesopotamia. And it came to pass, some 1500 years after Hammurabi's day, about B. C. 550, when the Hebrew people were now captive in Babylon (the great judge Daniel among them), that the Babylonian King, Nabunahid (as the Babylonian records call him), or Belshazzar (as the book of Daniel names him), gave a feast, and the mysterious hand came and wrote upon the wall.[16] And Belshazzar's thoughts were troubled, and his knees smote one against another, and he cried aloud to his wise men; but they could not interpret the writing; and then was Daniel brought in to read it. The fourth word of the handwriting on the wall, interpreted by Daniel at Belshazzar's Feast, was this: "Peres: Thy kingdom is divided, and given to the Medes and Persians." And "in that night", says the chronicle, "was Belshazzar the king of the Chaldeans slain."

Belshazzar was the last native ruler of Babylonia. He lost his empire to Cyrus, king of the new Persian nation, Aryans by race, coming from the east. Other new invading races followed; and by a century before Christ, under the Greek conquerors, the Babylonian legal system was supplanted. Hammurabi's pillar-code, and the vast



II. 16—DANIEL INTERPRETING THE HANDWRITING ON THE WALL FOR BELSHAZZAR

"Belshazzar gave a feast, and the mysterious hand came and wrote upon the wall. . . . The wise men could not interpret the writing, and then was Daniel brought in to read it. . . . And in that night was Belshazzar the king of the Chaldeans slain"

storehouses of legal records, were gradually buried under the rubble of ages; until, some 2000 years still later, another Aryan, this time coming from the west, a French explorer, DeMorgan, chanced upon the pillar-code and bore it away in triumph to the Louvre Museum,—the greatest prize of the century for the revelation of legal history.

Sources of Illustrations

1. *Map of Mesopotamia.* From *F. W. Putzger*, "Historischer Schul-Atlas", 16th ed., plate 3 (Leipzig, Velhagen & Klasing, 1890).
2. *Temple Tower of Babylon.* From the drawing in *Perrot* and *Chipiez*, "History of Art in Chaldea and Assyria", p. 370 (Chapman & Hall, London, 1884).
3. *Early Pictograph.* From the illustration in *Clay*, cited *infra*.

4, 5. *Deed of Storehouse.* From the facsimile in *Albert T. Clay*, "Legal and Commercial Transactions dated in the Assyrian, Neo-Babylonian, and Persian Periods", plate IV, text 3, translation 9 (University of Pennsylvania, Department of Archaeology, 1908).

6. *Warranty-Deed.* From the facsimile in *Albert T. Clay*, "Babylonian Records in the Library of J. Pierpont Morgan", plate I, text 23, translation 2 (Yale University Press, 1920).
7. *Boundary Stone.* From the facsimile in *L. W. King*, "Babylonian Boundary Stones and Memorial Tablets in the British Museum", plate LIII, p. 37, No. 90841 (British Museum, 1912).
8. *Judicial Decision.* From the facsimile in *Hermann Ranke*, "Babylonian Expedition of the University of Pennsylvania", Series A, Cuneiform Texts, vol. VI, part 1, text 60, translation 15 (University of Pennsylvania, 1906).
9. *King Sargon.* From the drawing in *Perrot* and *Chipiez* (cited *supra*), p. 96.
10. *Bunanitu v. Akabu-ilu.* From a photograph, by *R. B. Fleming*, of the original tablets in the British Museum, numbered 33945, 41459.
11. *Audience Hall at Nineveh.* From the drawing in "Bilder-Atlas", vol. VI, plate ii, No. 1 (F. A. Brockhaus, Leipzig, 1875).
12. *Sumerian Code.* From the facsimile in *Albert T. Clay*, "Yale Oriental Series, Babylonian Texts", vol. I, plate LI, p. 18 (Yale University Press, 1915).
13. *Pillar-Code of Hammurabi.* From the facsimile cast, in the Law School of Northwestern University, of the original pillar in the Louvre Museum.
14. *Transcription of Code.* From the drawing in *D. H. Muller*, "Die Gesetze Hammurabis", frontispiece (Vienna, Holder, 1903).
15. *Hanging Gardens of Babylon.* From the painting by *Thomas Moran*, as reproduced in *H. H. Bancroft*, "The Achievements of Civilization; the Book of Wealth" (New York, Bancroft Co., 1896-1900, 10 vols.; ed. Cygne Noir in the Newberry Library, Chicago).
16. *The Handwriting on the Wall.* From a reproduction of the painting by *J. Martin*.

Sources and References

Sources of Documents Quoted in Text

a. Deed of a Warehouse. From the translation in *Clay*, "Legal and Commercial Transactions", cited *supra.*

b. Warranty-Deed. From the translation in *Clay*, "Babylonian Records", cited *supra.*

c. Stone Landmark. From the translation in *King*, "Babylonian Boundary Stones", cited *supra.*

d. Marriage-Settlement. From the translation in *Robert W. Rogers*, "Cuneiform Parallels to the Old Testament", p. 394, text III (Eaton & Mains, New York, 1912).

e. Note Payable to Bearer. From the German translation in *M. Schorr*, "Urkunden des Altbabylonische Zivil-und Prozessrechts", No. 58, p. 88 (Leipzig, Hinrichs, 1913).

f. Instrument Payable to Order. From the German translation in *J. Kohler* and *F. E. Peiser*, "Aus dem Babylonischen Rechtsleben", IV, p. 63 (Leipzig, 4 parts, 1890-1898).

g. Partnership Contract. From the German translation in *Kohler* and *Peiser* (cited *supra*), III, p. 48 (1894).

h. Partnership Release. From the German translation in *Kohler* and *Peiser* (cited *supra*), II, p. 59 (1891).

i. Partnership Lawsuit. From the German translation in *M. Schorr*, "Altbabylonische Rechtsurkunden aus der Zeit der I. Babylonischen Dynastie", III, p. 18, No. 12 (Vienna, Holder, 1910).

j. Judicial Decision. From the translation in *Ranke*, Babylonian Expedition, cited *supra.*

k. Lawsuit Over a Will. From the German translation in *Schorr*, "Altbabylonische Rechtsurkunden" (cited *supra*), III, p. 61, No. 53.

l. Action for Price of Land Sold. Revised from the German translation by *M. Schorr*, in "Urkunden des Altbabylonischen Zivil-und Prozessrechts" (Leipzig, Hinrichs, 1913), p. 300, No. 280.

m. Bunanitu v. Akabu-ilu. From the translation by *T. Pinches*, in "Transactions of the Society of Biblical Archaeology", VIII, 271.

n. Appeal of an Accused. From the translation by *H. F. Talbot*, reprinted in "Records of the Past", XI, 101 (London, Samuel Bagster, n. d.).

o. Sumerian Code. From the translation in *Clay*, "Babylonian Texts", cited *supra.*

II. Mesopotamian Legal System

p. Hammurabi Code. From the translation in *Rogers*, "Cuneiform Parallels," p. 414, cited *supra*.—The stage of evolution represented by these passages is discussed by the present writer in his essay, "The Pledge-Idea: a Study in Comparative Legal Ideas" (Harvard Law Rev. X, 321).

q. Code of Assur. From the French translation in *V. Scheil*, "Recueil des lois assyriennes" (Paris, Geuthner, 1921).

General References

Wm. R. Harper and *Robert F. Harper*, "The Laws of Hammurabi" (University of Chicago Press, 1903).

C. H. W. Johns, "Babylonian and Assyrian Laws, Contracts, and Letters" (Edinburgh, 1904).

T. Pinches, "Babylonian Legal Documents" (1883).

J. H. Stevenson, "Assyrian and Babylonian Contracts" (Cincinnati, 1902).

A. H. Sayce, "Babylonians and Assyrians: Life and Customs" (London, 1901).

Z. A. Ragozin, "Story of Media, Babylon, Persia," chap. IX, "The House of Egibi" (New York, 1888).

D. L. Luckenbill, "Ancient Records of Assyria and Babylonia", vol. IV, "Ancient Law and Business" (University of Chicago Press, 1929).

S. A. Cook, "The Laws of Moses and the Code of Hammurabi" (London, 1903).

Also the collections, cited *supra*, of *Kohler & Peiser*, *Clay*, and *Schorr*, and other collections of documents published for the libraries of the University of Pennsylvania, Yale University, J. Pierpont Morgan, and the British Museum.



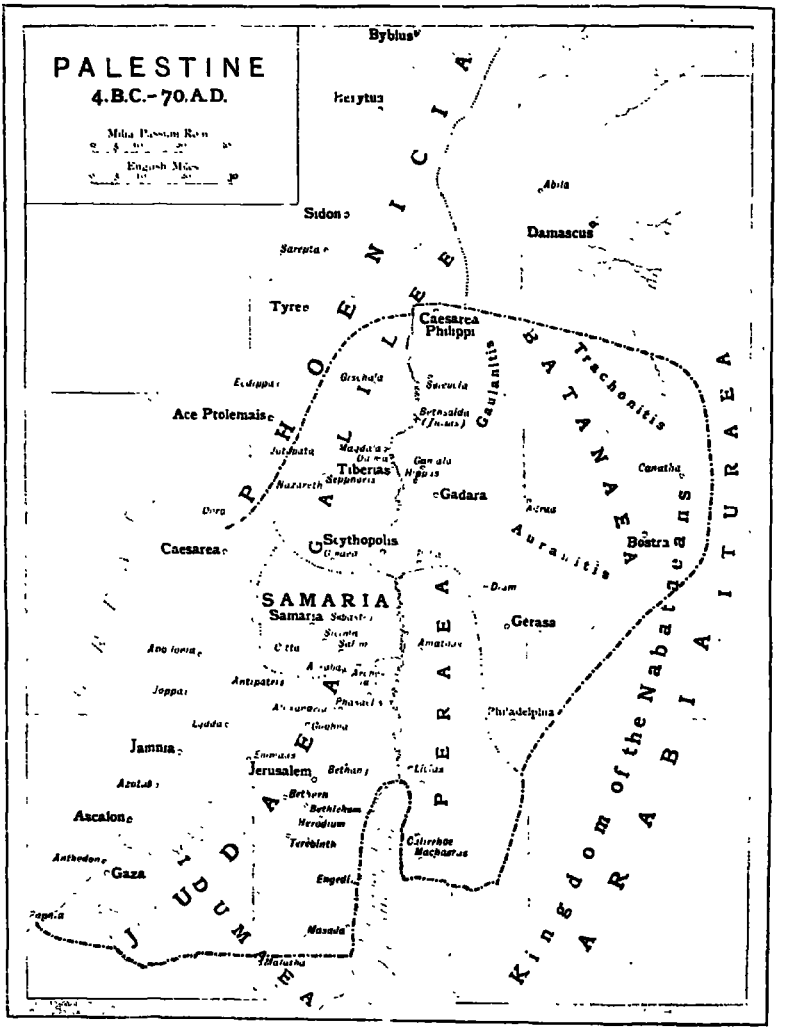
THE HEBREW LEGAL SYSTEM

III

The Hebrew Legal System

Shifting home of early Hebrews—Five stages of the legal system.

1. *Mosaic Period*—The Ten Commandments —Hebrew and Greek texts—Deuteronomy —Moses delegates justice to professional judges—Solomon—Absalom doing justice at the Gate—Solomon's judgment between the two mothers.
2. *Classic Period*—The Sanhedrin—The rabbi —The Temple—Loss of Hebrew political independence.
3. *Talmudic Period*—The Talmud—Development of law by precedents—Debates of the rabbi—Jesus debating in the Temple.
4. *Medieval Period*—Maimonides—Exchequer of the Jews—Commercial instruments—Marriage-contracts.
5. *Modern Period*—A Hebrew Code—Reading the Torah.



III. 1—Map of Palestine

III
The Hebrew Legal System

THE early Hebrew civilization was originally nomadic and pastoral, then agricultural, and only later commercial. Its home shifted, at various epochs, from Arabia to Egypt, then to Palestine, then to Babylon, then to Palestine again.[1]

It represented a much simpler and less advanced stage than its neighbors and older Semitic relatives, the Mesopotamians. But the contiguity of their territories linked their destinies in tribal struggles, for many centuries. Both in Egypt and in Babylon the Hebrew tribes sojourned for long periods as a subject people. About B. C. 2100 the patriarch Abraham saw King Hammurabi, as an enemy in battle. Nearly a thousand years later the leader Moses, with his brother Aaron, appeared in the court of Pharaoh (perhaps the great king Rameses II, B. C. 1300), and Aaron, it is recorded, cast down his rod before Pharaoh and it became a serpent; this was the first miracle by which Moses hoped to soften Pharaoh's heart, and free the Hebrews from their bondage. And it was some six hundred years still later that the great Hebrew judge Daniel, when a captive in Babylonia, must often have looked upon the code-pillar of Hammurabi, which at that time still stood on the acropolis of Susa.

III. Hebrew Legal System

In Daniel's time, Hebrew legal history was still in its first stage; for the Hebrew legal system developed in five well-defined stages:

CHART OF PERIODS OF HEBREW LAW

				About B. C. 1200
1. Mosaic Period	Moses, David, Solomon, Elijah, Daniel, Josiah, Ezekiel, Nehemiah, Ezra	Narratives and Codes	"Genesis", "Exodus", "Leviticus", "Numbers", "Deuteronomy"	B. C. 400
2. Classic Period		Reports of Cases		B. C. 300
		Commentaries		A. D. 100
3. Talmudic Period		Digests: The "Mischna"		A. D. 200
		Digests: The "Gemara"		A. D. 500
		[DISPERSION OF THE HEBREW PEOPLE]		
4. Medieval Period		Private Codes		A. D. 700
		Commentaries		A. D. 1500
5. Modern Period		Translations		A. D. 1600
		Printed Editions		A. D. 1900

First came the Mosaic period, to B. C. 300, including the kings, the prophets, and the judges; then, the classic period, when the rabbi developed the law; then the



Ill. 2—Moses Breaking the Tables of the Law

The people of Israel had set up a golden calf to worship it, and Moses' anger waxed hot and he cast the tables out of his hands and brake them

Talmud period, when the records were consolidated; then the medieval and the modern periods. Strictly as a system of law, it ended with the second stage, A. D. 100, at the replacement of Jewish law in Palestine by Roman rule; after that, it became mainly local custom, chiefly in ceremonial and moral rules.

1. In the first, or Mosaic period, comes the Pentateuch, or Five Books; and to the summit of Mount Sinai, in Arabia, the lofty pinnacle five thousand feet high from the plains below, Moses is said to have gone up to receive from Jehovah the Two Tables of the Law. On his first return, bearing the tables writ with the Divine finger, he found that the people of Israel had been fickle and had set up a golden calf to worship it, and Moses' anger waxed hot and he cast the tables out of his hands and brake them.[2] But at Moses' prayer, Jehovah forgave the people and again wrote the Law upon Two Tables like the first, and Moses came down again from the mountain, and his face shone with light so that the people were afraid.

These Ten Commandments, on the two tablets of stone, were the greatest short moral code ever formulated, and are still far in advance of Humanity's and even Christianity's daily life:[a]

[*The Ten Commandments.*] "I. Thou shalt have none other gods before me.

"II. Thou shalt not make thee any graven image, or any likeness of any thing that is in heaven above, or that is in the earth beneath, or that is in the waters beneath the earth: Thou shalt not bow down thyself unto them, nor serve them; for I the Lord thy God am a jealous God, visiting the iniquity of the fathers upon the children unto the third and fourth generation of them that hate me, and showing mercy unto thousands of them that love me, and keep my commandments.

"III. Thou shalt not take the name of the Lord thy God in vain: for the Lord will not hold him guiltless that taketh his name in vain.

"IV. Keep the sabbath-day to sanctify it, as the Lord thy God hath commanded thee. Six days thou shalt labour, and do all thy work: But the seventh day is the sabbath of the Lord thy God: in it thou shalt not do any work,—thou, nor thy son, nor thy daughter, nor thy man-servant, nor thy maid-servant, nor thine ox, nor thine ass, nor any of thy cattle, nor thy stranger that is within thy gates; that thy man-servant and thy maid-servant may rest as well as thou. And remember that thou wast a servant in the land of Egypt, and that the Lord thy God brought thee out thence through a mighty hand and by a stretched out arm; therefore the Lord thy God commanded thee to keep the sabbath-day.

"V. Honour thy father and thy mother, as the Lord thy God hath commanded thee; that thy days may be prolonged, and that it may go well with thee, in the land which the Lord thy God giveth thee.

"VI. Thou shalt not kill.

"VII. Neither shalt thou commit adultery.

"VIII. Neither shalt thou steal.

"IX. Neither shalt thou bear false witness against thy neighbour.

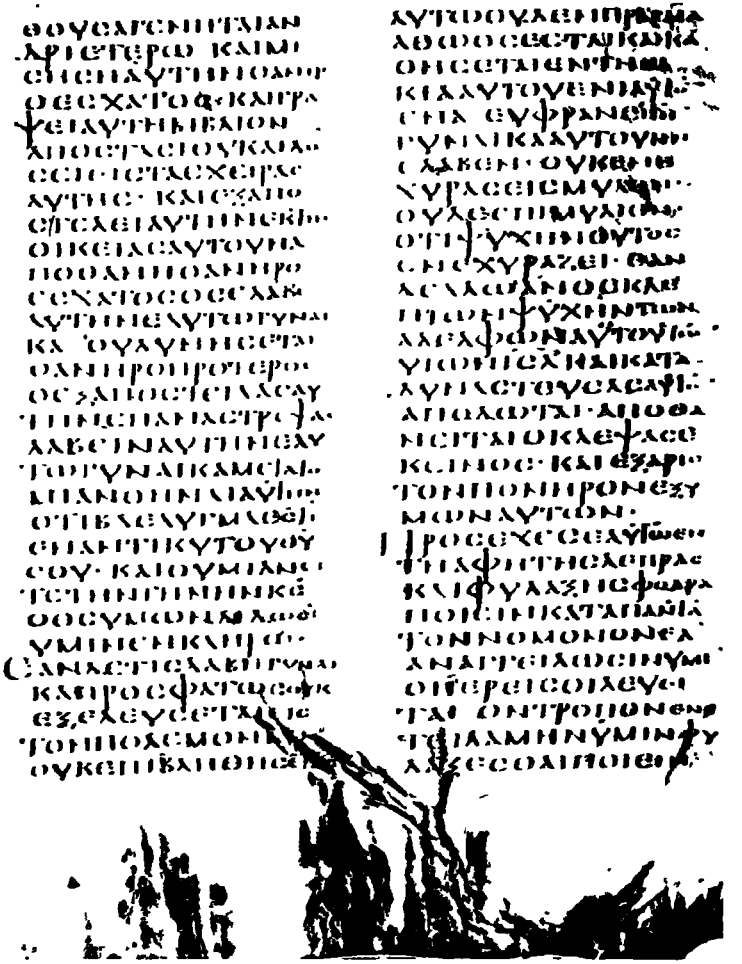
1. Mosaic Period

"X. Neither shalt thou desire thy neighbour's wife, neither shalt thou covet thy neighbour's house, his field, or his man-servant, or his maid-servant, his ox, or his ass, or any thing that is thy neighbour's.

"These words the Lord spake unto all your assembly in the mount out of the midst of the fire, of the cloud, and of the thick darkness, with a great voice: and he added no more. And he wrote them in two tables of stone, and delivered them unto me."

The five books of the Pentateuch were known as the Torah, or Ancient Law. But modern research tells us that these texts of the Pentateuch were only gradually built up during some eight centuries of development. The earlier parts were probably inscribed in Aramaic, an alphabetic form of Assyrian. Towards the close of this first period, when most of them had accumulated, they were rendered into a language known as Square or New Hebrew; but the earliest extant example of this style of script dates from about A. D. 100. Finally, they were put into Greek, by the scholars of Alexandria, about B. C. 250.; the law-book Deuteronomy has one of the oldest texts in this script now surviving; it dates from A. D. 400 or 500;[3] the following is an illustrative passage:[b]

"When a man hath taken a wife, and married her, and it come to pass that she find no favour in his eyes, because he hath found some uncleanness in her: then let him write her a bill of divorcement, and give it in her hand, and send her out of his house. And when she is departed out of his house, she may go and be another man's wife. And if the latter husband hate her, and write her a bill



III. 3—The Book of Deuteronomy, in Greek Script

The Pentateuch was put into Greek about B. C. 250, at Alexandria, the metropolis of learning; but the oldest extant manuscripts are some seven centuries later.

of divorcement, and giveth it in her hand, and sendeth her out of his house; or if the latter husband die, which took her to be his wife; her former husband, which sent her away, may not take her again to be his wife, after that she is defiled; for that is abomination before the Lord: and thou shalt not cause the land to sin, which the Lord thy God giveth thee for an inheritance."

During this period, as the tribal population multiplied and political life became more complex, the transition took place from the personal justice of the tribal leader to an organized hierarchy of local courts. It is thus recorded (as if it had been done at a single instant) in the traditions of the book of Exodus:

"And it came to pass on the morrow that Moses sat to judge the people: and the people stood by Moses from the morning unto the evening. And when Moses' father-in-law [Jethro] saw all that he did to the people, he said, 'What is this thing that thou doest to the people? Why sittest thou thyself alone, and all the people stand by thee from morning unto even?' And Moses said unto his father-in-law, 'Because the people come unto me to inquire of God. When they have a matter, they come unto me, and I judge between one and another; and I do make them know the statutes of God, and his laws.'

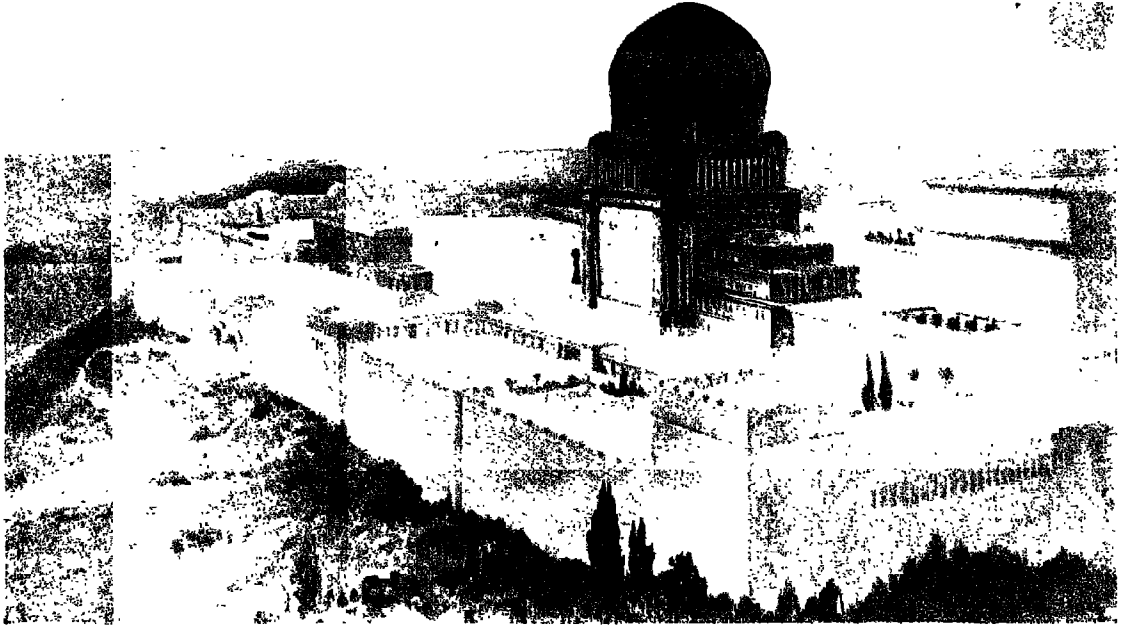
"And Moses' father-in-law said unto him, 'The thing that thou doest is not good. Thou wilt surely wear away, both thou and this people that is with thee: for this thing is too heavy for thee; thou art not able to perform it thyself alone. Hearken now unto my voice, I will give thee counsel, and God shall be with thee: Be thou for the people to God-ward, that thou mayest bring the cause unto God; and thou shalt teach them ordinances and laws, and shalt show them the way wherein they must walk, and the work that they must do. Moreover, thou shalt provide, out of all the people,

able men, such as fear God, men of truth, hating covetousness; and place such over them to be rulers of thousands, and rulers of hundreds, rulers of fifties, and rulers of tens; and let them judge the people at all seasons. And it shall be, that every great matter they shall bring unto thee, but every small matter they shall judge. So shall it be easier for thyself; and they shall bear the burden with thee. If thou shalt do this thing, and God command thee so, then thou shalt be able to endure, and all this people shall also go to their place in peace.'

"So Moses hearkened to the voice of his father-in-law, and did all that he had said. And Moses chose able men out of all Israel, and made them heads over the people, rulers of thousands, rulers of hundreds, rulers of fifties, and rulers of tens. And they judged the people at all seasons: the hard causes they brought unto Moses, but every small matter they judged themselves."

The judges thus deputed were members of the priestly class; in this respect the measure contrasts with the stage of a secular judiciary long before reached in Babylonia in King Hammurabi's time (*ante*, Chap. II). But the change was momentous to the future of Judaism; for it signified that this particular group of primitive Semite tribes were now developing a legal system, by the activities of a professional class.

It is in this first, or Mosaic, period of splendor that the famous Temple-palaces were built.[4] Within the Temple enclosure was enacted the whole legal drama of the Hebrew people. The Great Sanhedrin (or, Synhedrion), the Supreme Assembly of Elders, held its political trials of



III. 4—Temple-Palace of Solomon

Within this enclosure was enacted the whole legal drama of the Hebrew people

Jeremiah and other leaders in the Court of the Great Temple. The Hebrew King did justice, as with other earlier peoples, at the Temple Gate or the Palace Gate; and we read in the Book of Samuel[c] that when Absalom sought seditiously to undermine the authority of his father, King David, he went and sat at the Gate; and when any man, that had a controversy, came for the king's judgment, Absalom would say to him, "Oh, that *I* were made judge in the land, that every man which hath any suit might come unto *me*, and *I* would do him justice!" And so, says the chronicle, "Absalom stole the hearts of the men of Israel".

Solomon, the son of David, in all his glory, became famous in his day as a royal builder; his date is about B. C. 900. But Solomon the royal Judge, as a sage skilled in human nature, made his name for all time a synonym for judicial wisdom. For God had appeared to the young King Solomon in a dream,[d] and bade him ask any gift; and Solomon asked the gift of an understanding heart, to judge his people, that he might discern between good and bad. And God gave him such wisdom as no man before ever had, and his fame was in all nations round about. And there were two women who lived together and had each a babe, and one babe died, and its mother exchanged it secretly for the living one, and they disputed for the

living one before Solomon, and he said, "Take a sword, divide the living child in two, half for each." And the false mother said, "So be it". But the true mother said, "Nay, nay, do not slay the child, but give it to her!"[5] And Solomon's wisdom thus discovered the true mother, and the people saw "that the wisdom of God was in him, to do judgment".[e]

2. The second, or Classic, law-period is formed by the legal practice developing between B. C. 300 and A. D. 200.

The government was in theory still a theocracy, i. e. divine command inspiring the rulers. The Jewish historian Josephus, writing towards the end of this period, thus philosophizes:[f]

"Some legislators have permitted their governments to be under monarchies, others put them under oligarchies, and others under a republican form. But our Legislator had no regard to any of these forms, but ordained our government to be what (by a strained expression may be termed) a Theocracy, by ascribing the authority and the power to God And where shall we find a better or more righteous constitution than ours? This makes us esteem God to be the governor of the universe, and *permits the priests in general to be the administrators of the principal affairs*, and withal intrusts the government over the other priests to the chief high priest himself These men had the main care of the law and of the other parts of the people's conduct committed to them; for they were the priests who were ordained to be inspectors of all, and the judges in doubtful cases, and the punishers of those that were condemned to suffer punishment."



III. 5—SOLOMON'S JUDGMENT BETWEEN THE MOTHERS

"And the king said: 'Divide the living child in two, and give half to the one and half to the other.' Then spake the woman whose the living child was, 'O my lord! give her the living child, and in no wise slay it!'"

2. *Classic Period*

By this period the function of justice had ceased to be a royal one. The Jewish people came now successively under the suzerainty of Persian, Greek, and Roman rulers; but in their internal government the supreme authority—religious, social, and political; legislative and judiciary—was vested in a Senate, known finally under the name Great Synhedrion. (This was a Greek term, meaning "assembly," hebraicized as "sanhedrin"; the native Hebrew term was "Bet din hagadol", or, "high council", "high court".) It consisted of seventy-one members, and its most frequent activity was that of a Supreme Court. Under it were two intermediate synhedrions in Jerusalem, and others in the larger cities. Each lesser synhedrion consisted of twenty-three members. Beneath them all were village courts of three members. The synhedrion of twenty-three members sat in a semi-circle, and in front of each member sat three of his chosen disciples, making three lower semi-circles. Each judge thus had three juniors to assist him, and when a vacancy occurred the place was taken by the junior next in line. Thus the courts were recruited by a system of apprenticeship and promotion from the lower to the higher.

And the supply of recruits was furnished by the numerous schools of religious law; those aspirants who

graduated and were ordained as masters ("rabbi") became eligible for election to a synhedrion.[6] The most famous of these schools is said to have had twelve hundred students. The Jewish judge could lawfully follow



III. 6—A Doctor of the Law

any other occupation on the days when the court was not in session; and some of the most eminent were principals of these schools of law. Thus there was a constant contact between the courts and the schools. Indeed, the schools were the preservers of the law to posterity; for although there were clerks attached to every synhedrion,



III. 7—Jesus in the Temple with the Doctors of Law

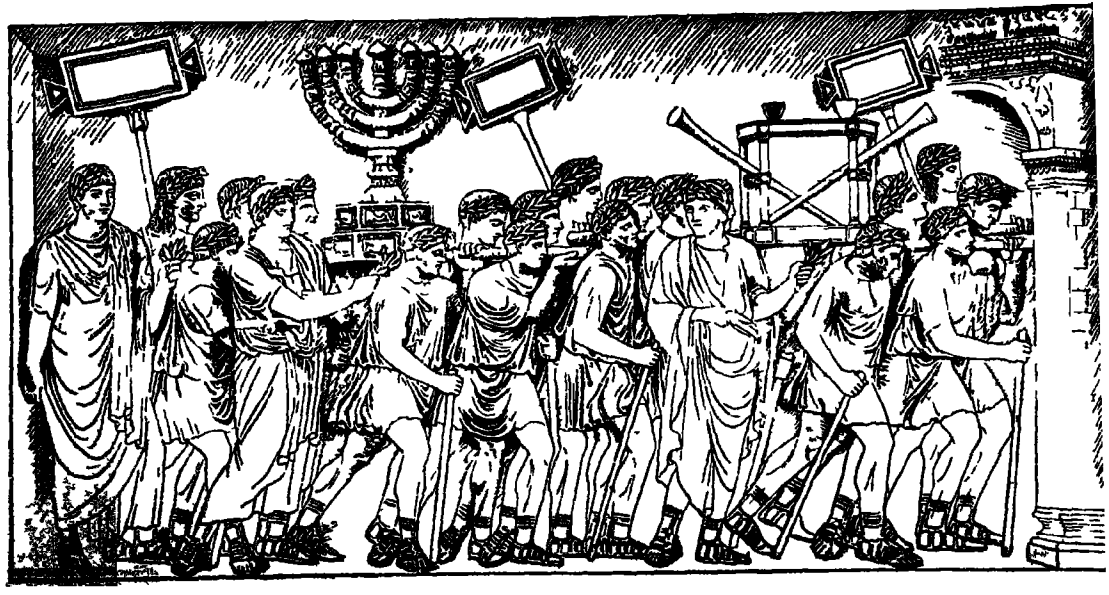
"After three days they found him in the Temple, sitting in the midst of the doctors of law, both hearing them and asking them questions"

no records of the judgments, directly made, have come down to us. The copious rules and decisions, elaborated during this period, are known only through the reports of discussions in the schools, long carried in memory (extraordinary as this seems) and reduced to writing in a later period.

Jesus first attracted notice by his precocious display of learning and wisdom in his arguments of law with the rabbi;[7] for when his parents, going home from Jerusalem, discovered that their boy of twelve years had been left behind, they turned back anxiously, and after three days they found him in the temple, sitting in the midst of the doctors of law, both hearing them and asking them questions.

Under the Roman sovereignty, which here intervened, the Jewish people for two centuries preserved the administration of their own law, in the main. The ruler Herod was still termed king; and at the inner Court of the Temple at Jerusalem a stone known as Herod's Pillar, inscribed in Greek and Latin, was the symbol of this independence; it warned intruders of the death penalty for any Gentile who entered the holy spot.

But the convulsive political rebellions of the Jews, after the time of Jesus, led the Roman Emperor Vespasian to take rigorous revenge. Jerusalem fell, under the as-



III 8—Titus' Arch Sculpture Showing the Ark Captured
The Roman soldiers carried into Rome the Ark, containing the Scroll of the Law, the Seven Branched Candlestick, and the Silver Trumpets

saults of Titus, son of Vespasian, in A. D. 70. And the soldiers carried away to Rome the sacred Ark of the Law,[8] containing the Scroll of the Law, and the Seven-Branched Candlestick, as part of the spoils in Titus' triumphal procession. The Hebrew general was cast headlong from the Tarpeian Rock, pursuant to ancient Roman custom with a vanquished people. Hebrew self-government ended; and their legal system, as such, ceased to prevail.

3. The third period, the Talmudic, from A. D. 200 to A. D. 500 is formed by the Talmud, i. e. reports of all recorded cases and commentators since about B. C. 300, digested in two authoritative collections,—the Mishnah, or codified text, compiled about A. D. 200, in New Hebrew script, and the Gemara, or commentary, about A. D. 300-500, compiled in Aramaic script.

No systems, except the Roman, the Mohammedan, and the Anglican, have surpassed or equalled the Hebrew in emphasizing development by reasoning based on case law, and in preserving the fame of individual jurists and judges and the annals of their decisions. The names of nearly one hundred rabbi are mentioned in the Talmud as the authors of decisions; and many more must have contributed. The most famous, in the compilation of the Talmud, was Rabbi Hillel, a contemporary of Jesus of Nazareth, and president of the Great Synhedrion. He



מסכת

ברכות

מן

תלמוד בבלי

עם רש"י. תוספות. ותוספות ישנים. ומסקי תוספות. רבינו אשר. קצור פסק
דראש לטו רבינו יקר. גליון הש"ס. ותוספות אשרי מנחם יחיאל מקוצי הל. ופירוש רמשניות
לדרמבים הל. פירוש רבינו שמשון משאנץ הל ופירוש רבינו אשר הל לסשניות סדר טעהרות.
מבוא התלמוד לרבינו שמואל הנגיד הלוי הל. קלי גלוה קצור כללי התלמוד מלוקט מספרי הגאונים עי הגים יחידה
ערוך לנר הל רש"ר הסופרים. סמסורת הש"ס. עין משפט (פרוש מקוצות הש"ס מהגאונים). ונר מצוה (מסדר סדר
הש"ס שנמצאו בכת הסופרים). ותקוני סופרים. מל שלח שרי ויכוי הגים ומהשקו בהגה הל ומנהגי שלוי הסופרים לרי"ח. חלופי גרסאות.
הגהות לשון הקצרות. בסמ"ק השם ועין משפט לרבינו יוסף קרא שמואל הל ומברק פסחים (מסדר מלוקט מכלי הסופרים
בשנת תק"י—תס"ו). והגהה ותוספות מראה מקומות לרבינו ישעיה (פיק) ברלין הל ומברק נקמליא. שמשון בשאר ירמיה
ועקיבא נפתלי.

א) שו"ת חכמת שלמה (מדרשל) לרבינו שלמה לוריא הל.
ב) ותוספות רי"ד (מדרשא) לרבינו יוסף קרא הל
ג) ותוספות אנשי שם לרבינו משה מקוצי הל
ד) מאור עיני חכמים (מדרש לוגליף) לרבינו מאיר
סרבורג הל.
ה) תוספות מרדכי שף לרבינו מרדכי בן הלל
אשכנזי ז"ל. קלי מאיר הגהות מרבינו מאיר
סרבורג הל מברק פסחים.
ו) בעלי תוספות (מדרשא) לרבינו יום טוב
ז) חדושי הרשבא (מדרשא) לרבינו שלמה בן אדרת
ח) פירוש רבינו גרשום מאור הגולה
ט) תשובות הגאונים שערי תשובה
י) קונטרס אחרון לרבינו יצחק בן גיאת
יא) תשובות הגאונים שערי צדק לרבינו יהודאי גאון
יב) חסר אברהם בר' יהודה הכהן מלוניל הל. מלוקט
מכלי הסופרים הל ר' שמשון מקוצי הל.

יג) מסורת חדשות (מדרשא) לרבינו שלמה בן אדרת
מברק פסחים. שם תקנים הגהות מרבינו מאיר
הלוי מקוטנא הל ומרבינו מאיר סרבורג הל ומברק
(בכתב יד הרב)
יד) הגהות הב"ח לרבינו יואל סירקש הל מברק קראקא
(בכתב יד הרב).
טו) הגהות הגר"א לרבינו אליהו מווילנא הל מברק
ווילנא (בכתב יד הרב)
טז) מראה יחזקאל הגהות לרבינו יחזקאל לנדא הל מברק
פראג (בכתב יד הרב)
יז) מעשה רב הגהות לרבינו חיים יוסף דוד אזולאי הל
יח) גליון הש"ס הגהות מקובא אחד הל מברק ווילנא
יט) גליון מהרש"א חדושים לאגדות מרבינו שלמה אדרי הל מברק
כ) הגהות הגר"ש קראנץ (בכתב יד הרב)
כא) הגהות הגר"א אלעזר פלייקיש הל מברק ווילנא
כב) חדושי הגרי"ח הלוי הל מברק ווילנא

בירושלים ובמדפיסי אשכנז ובמדפיסי פולין

בדפוס והוצאות האלמנה והאחים ראם.
שנת תרנ"ו לפ"ק

III. 9—The Talmud

The Talmud is an immense cyclopedia, ranging over history, mathematics, medicine, theology, and metaphysics, as well as law

first organized the vast mass of materials. A great successor, Rabbi Akiba, in the 2d century A. D., improved the system. And then Rabbi Judah, at the close of the century, gave final form to the collection, known thenceforth as Mishnah, or "learning". It contains sixty-three concise treatises. During the next three centuries copious discussion in the schools centred around the text of the Mishnah. At Jerusalem, about A. D. 300, a digest of these discussions was made; and at Babylon (another and even greater Jewish center), about A. D. 500, another collection was made; these were known as the Gemara (or, "Commentaries"). The Mishnah and the Gemara together form the Talmud.[9]

The Talmud is an immense cyclopedia, ranging over history, mathematics, medicine, theology, and metaphysics, as well as law. For the law, it serves as the copious record of elaborate arguments and decisions on rules and cases adjudged by the doctors of the law.

The style of reasoning is illustrated in the following passage on the subject of Bailments:[g]

[*The Talmud.*] "*Mishnah*, V: All special artificers are considered bailees for hire. If, however, they have notified the owners that the work is ready and they may take it, and the payment should be made thereafter, they are considered from that time gratuitous bailees. If one says: 'Guard for me this article, and I will guard yours,' the depositary is considered a bailee for hire. If

one says: 'Guard for me this article,' and the depositary answers: 'Leave it with me,' he is a gratuitous bailee. If one has lent money on a pledge, he is considered a bailee for hire. R. Jehudah, however, said that if he has lent him money on a pledge (without interest) he is considered a gratuitous bailee; if, however, he has lent fruit on the pledge, he is considered a bailee for hire

"*Gemara:* '*If, however, they have notified,*' etc. There is a Mishna (in Chapter VIII of this tract): 'If the borrower told the lender to send through a messenger, and he did so, he is responsible for an accident; and the same is the case when he returns it in that way.'

"Huna Mar b. Mrimar, in the presence of Rabina, raised a contradiction between the two Mishnas mentioned above, and afterwards explained them as follows: In our Mishna it is stated: If they said, 'Take yours,' etc., they are considered from that time bailees for hire; and the same is the case if they have notified the owners that the work is ready for them. Is it not a contradiction from the above-cited Mishna that if the borrower told him to send, etc., he is responsible? (Hence we see that it is considered under the control of the borrower even when he returned it, and this contradicts the statement in our Mishna, which is, that as soon as the specialist has notified the owner of the article that it is ready for delivery it is considered under the control of the owner.) And he himself answered that Raphram b. Papa said, in the name of R. Hisda, that the cited Mishna treats of when the borrower has returned the loan through his messenger before the agreed time has elapsed (consequently it was under his control unquestionably); but if he did so after the elapse of the agreed time, he is free.

"The schoolmen propounded a question: What is meant by the expression 'free'? Is it meant free of the responsibility of a borrower (who is responsible for an accident also), but that he is still responsible as a bailee for hire (who must pay for theft and loss), or does it mean entirely free from any charge? Said Amimar:

It seems that he is free only from the responsibility of a borrower, but not from the responsibility of a bailee for hire; as he has derived benefit from it, he is considered such

"'*Guard for me*,' etc. Why so? Is this not to be considered a guard in the presence of the owner?

"The rabbis taught: If one say: 'Guard for me this article, and I will guard yours to-morrow; or, lend me, and I will lend you'; 'guard for me, and I will lend you', or vice versa, all are considered bailees for hire, one to the other.

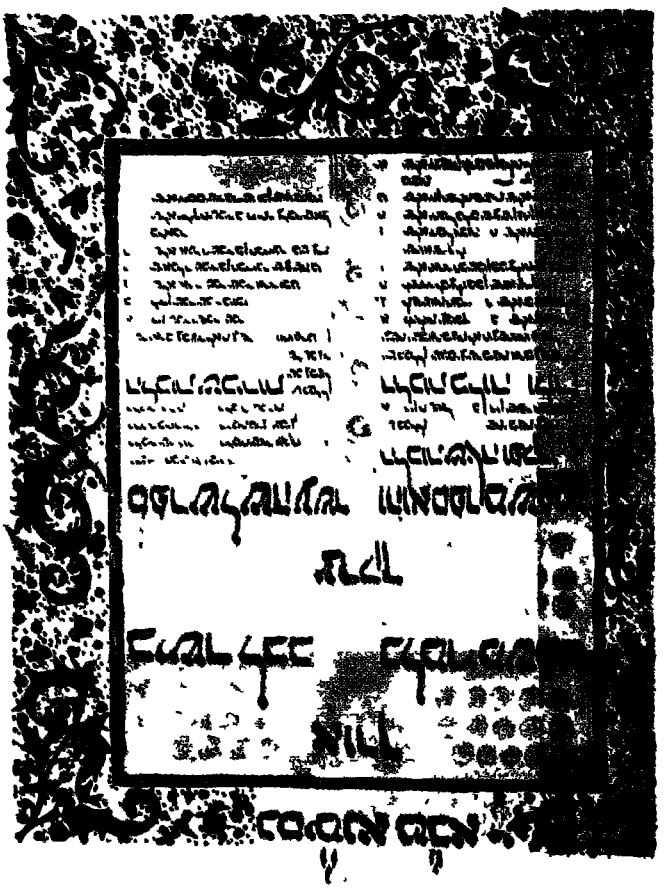
"There were sellers of spices who agreed that each one of them should be engaged one day in each week in preparing food for the whole company. One day they said to one of their number: 'Go and bake bread for us', and he replied: 'Then guard for me my garment.' They, however, neglected to do so, and the garment was stolen; and when the case came before R. Papa, he made them responsible. Said the rabbis to R. Papa: Why should they be responsible? Was not the neglect in the presence of the owner? And he was embarrassed. Finally it was learned that at the time the garment was stolen its owner was not occupied in baking, but was drinking beer (consequently the decision of R. Papa was a just one). But why was R. Papa embarrassed? There is a different opinion between the Tanaim in such a case. According to one, he is free; and according to the other, he is not. Could not R. Papa say that he agreed with the latter? The case was, the day on which he was told to bake for the company was not the day appointed for him, and he was asked to do this as a favor. He, however, says: 'For this favor you will favor me by guarding my garment,' and it was not owing to wilful neglect that it was stolen. And R. Papa made them responsible according to the law of a bailee for hire; and the rabbis told him that the company ought not to be held responsible, because of the law concerning a guard in the presence of the owner, to which all agree that there is no responsibility, and

therefore he was embarrassed; but finally it was learned that his decision was correct as stated above.

"There were two men on the road; one was tall and the other was short. The tall man was riding an ass, and with him an ironed sheet for a covering, and the short one was covered with a cloak (a woolen one). When they came to cross a stream, the short man placed his cloak upon the ass, and instead of it took the sheet of the tall man and wrapped himself up in it, and the water carried it away. When the case came before Rabha he made him responsible. Said the rabbis to Rabha: Why should he be responsible? Was it not in the presence of his owner (i. e., at the same time the sheet was lost, the lender was crossing the stream with the borrower's cloak; is this not equal to the case, 'guard my article, and I will do so with yours,' of which it is said above that if it was at the same time there is no responsibility)? And Rabha was embarrassed. Finally, it was learned that the short man took it without the consent of his comrade, and he also placed his cloak upon the ass without consent

"'*On a pledge, he is a bailee for hire*,' etc. Our Mishna is not in accordance with R. Eliezer of the following Boraitha: 'If one lends money on a pledge, and the pledge was lost, he may take an oath that there was no wilful neglect in guarding it, and collect his money from the borrower; so is the decree of R. Eliezer.' R. Aqiba, however, maintains the defendant may claim, 'You have lent me the money only on this pledge, and as the pledge is lost, so is your money.' But if he lends a thousand zuz on a note, and also added a pledge, then all agree that he loses his money in case the pledge is lost (as then the pledge is not for any other purpose than to collect the money from it in case of default; otherwise the note would be sufficient even from an encumbered estate. Hence we see that R. Eliezer considers the possessor of the pledge a gratuitous bailee, contrary to our Mishna).

"Shall we assume that the above-mentioned older masters



III. 10—A Treatise of Maimonides, about A D. 1440

[of the Mishna period] speak of a case in which the pledge was not worth the amount lent upon it, and their point of differing is in a case which is similar to Samuel's following theory: If one lends to his neighbor a thousand zuz, and pledges for them the handle of a scythe only, if the handle is lost, the thousand zuz are lost (as he accepted it as a pledge for his money, he intends to collect his money only from it)? Nay, when the pledge was not worth the amount lent, none of them agrees with Samuel, as they speak of a pledge worth the amount lent.

"But is it to be assumed that as to the above decision of R. Joseph the older masters differ? Nay; all agree with his decision. Here, however, they differ in case the lender uses this pledge for the purpose of deducting from the debt. According to one, a meritorious deed was done by him by lending the money (for which he will be rewarded), and he is therefore considered a bailee for hire; and according to the other, the using of the pledge is for his own sake, and there is no meritorious deed, and therefore he is considered a gratuitous bailee."

4. The fourth, or medieval, period of Hebrew law begins at the dispersion of the Jewish nation, which culminated about A. D. 500 and extended over the next thousand years. In this period learned rabbi wrote treatises (in Hebrew or Arabic), compiled codes, and thus perpetuated the traditions of the law. One of the most famous was Maimonides,[10] who lived in North Africa in the 1400's, and wrote numerous works. By this means the common customs of religious and family life and commercial practice were kept alive, though the race was scattered in many countries.

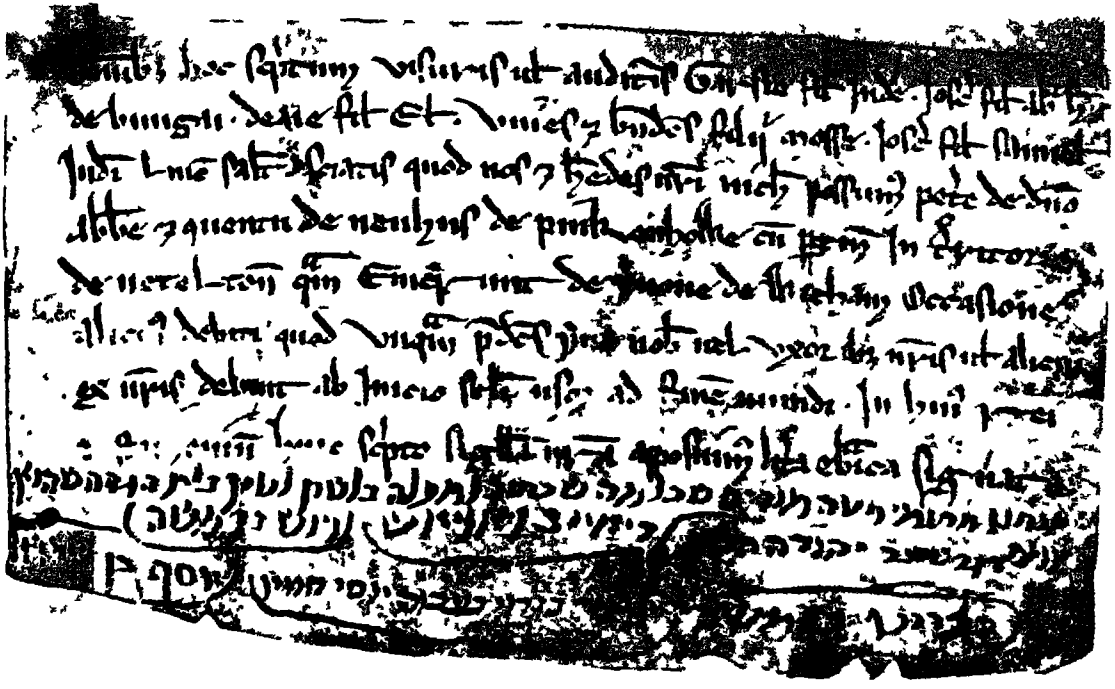
III. Hebrew Legal System

In England, after the Norman conquest, large numbers of Jews came over from the Continent. Beginning about A. D. 1200, and lasting until their expulsion a century later, a special status was given to the Jewish communities by the English kings in two royal charters. One of these charters provided that civil disputes in which Jews alone were concerned should be left to their own tribunals:[h]

[*Charter for Jewish Civil Justice.*] "John by the Grace of God, etc. Know that we have granted and by our present charter confirmed to our Jews in England that the breaches of right that shall occur among them, except such as pertain to our Crown and Justice, as touching homicide [etc.] be examined and amended among themselves according to their Law, so that they may administer their own justice among themselves".

But no records of this Jewish justice appear to be extant.

The other charter provided for suits between Christians and Jews, and prescribed the procedure and mode of proof. For such suits a special tribunal was created—a branch of the Exchequer Court, "Scaccarium Judeorum". Now the Jews, debarred from most other occupations, made their living chiefly as lenders of money; hence, money-claims founded on bonds[11] were a principal subject of this litigation; and the Crown, for the better protection of the creditors (as well as in its own interest



III 11—Shltar (Dfed) oi A D 1236
The Jewish term for deed oi bond was ' shetar In this one, the upper part is in Latin, the lower part in Hebrew

as a tax-gatherer), established "archives", or registries of bonds, in which the instrument must be recorded, in order to be valid.

The Englishman's bond, or contract, was made out in the usual form of English practice, thus:[i]

[*English Debtor's Bond to a Jew.*] "Know all men present and future that I William son of Ralph of Hetheby owe to Jacob son of Jacob a Jew two marks of silver to be repaid on the octave of St. Michael in the 44th year of the reign of King Henry son of King John, and unless I shall so repay I shall give to him every week two pence per pound interest as long as I am bound by the said debt, and thereto I have pledged to him all my lands and chattels. Done Wednesday after Palm Sunday of the said year."

But when the Jewish creditor assigned or released the debt, he made out the instrument in the form to which he was accustomed in dealings with his own people, thus:[j]

[*Jewish Creditor's Release.*] "Aaron son of Abraham acknowledged by his starr that he quitclaimed and pardoned to Robert de Mares and his heirs and assigns all the manor of Akemere which he bought of John de Mares brother of the said Robert; so that neither he nor his heirs can demand or claim aught upon the said manor with its appurtenances by reason of any debt which the said John owed him from the creation of the world to the end."

The Jewish term for deed, or bond, was "shetar" or "starr", from the Hebrew "starra" (memorial). It was sometimes written in Hebrew with a Latin translation, sometimes in Latin alone, sometimes in Latin with Hebrew characters. This term "starr" is supposed by some

scholars (but with little ground) to have given rise to the famous name "star-chamber", on the theory that these Jewish starrs were once preserved in that room.

The Jews in those days lived their family life largely by their own rules; for the Jewish communities were often compelled by political prejudice to reside in segregated areas of city or country. A highly decorated marriage-contract from the eighteenth century[12] illustrates how they developed their own legal forms for transactions, especially in family affairs, such as inheritance and marriage.

Many of these customs are surviving today. For the modern certificate of marriage, there is a printed form of 1915, published in New York.[13] It reads as follows:

[*Certificate of Marriage, A. D. 1915.*] "On the 5th day of the week, 15th day of the month of Nisson, year 5680 since the creation of the world.

"Be it known that the bridegroom Jacob, son of Abram, said to the maiden Sarah daughter of Solomon, 'Be thou my wife according to the law of Moses and of Israel, and I will labor to support thee honorably and to nourish thee, according to the custom of Jewish men who labor for the honorable maintenance and support of their wives, and I grant thee as nuptial gift the price of thy maidenhood, two hundred zuzin, due thee according to the law of Moses. I am also to provide thee with food, raiment, and all necessaries, also to visit thee after the manner of the world'.

"Thereupon the said maiden consented to become his wife and brought unto him the dowry given to her by her family, consisting of [enumerating the articles] . . .



III. 12—MARRIAGE-CONTRACT, A. D. 1795



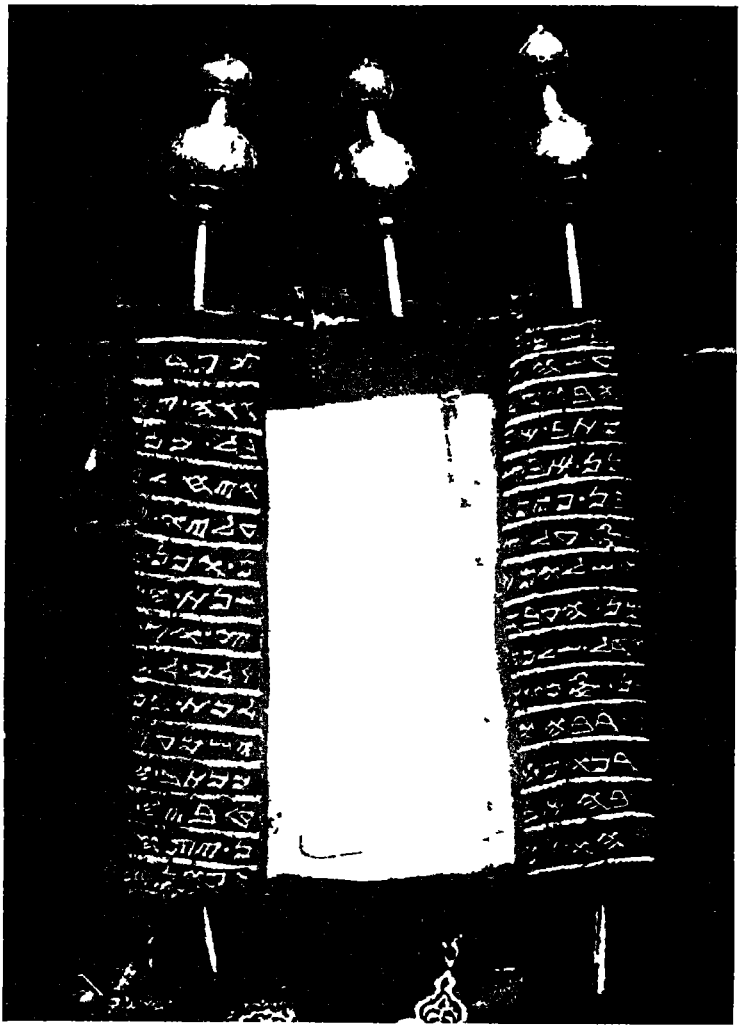
III. 13—CERTIFICATE OF MARRIAGE, A. D. 1915

"And the aforesaid bridegroom said, 'By virtue of this document I hereby accept responsibility for the integrity of this dowry, and of my addition thereto, for myself and my heirs, ... all of my property I pledge as security for the payment of the sum set forth above, and I even pledge the very cloak on my shoulders, this security to continue during my life and after that, from this day forth forever.'

"We [the undersigned marriage-go-betweens] have purchased the right of this man, namely the bridegroom, and have vested it in this worthy woman, namely this maiden, entitling her to all that is above set forth, by a token with which the right has been duly purchased. And this certifies that the agreement is valid and binding."

5. And this brings us to the fifth and last period in the history of the Jewish legal system. From A. D. 1600, nationalism in Europe began to amalgamate all races who lived within given territories, and to emphasize national languages; so the Hebrew language became only a secondary one for Jews. During this period the Talmud was critically studied and translated into the various national languages. In New York, in 1915, Rabbi Kadushin has even produced a new modern Hebrew Code in English.

But even today, the Scroll of the Law[14], known as the Torah, or precepts of Moses, fixed on two staves and unrolled from right to left in ancient fashion, is preserved in every synagogue; and the Ark of the Law, standing at the altar of the Synagogue, is thus the most important treasure in the Sanctuary, because it contains this the



III. 14—The Scroll of the Law

Jew's most precious possession, the Torah.[15] And as in the days of old, it is recorded that the good king Josiah, when the lost book of the Law was found, went up into the temple with all the people of Jerusalem, both small and great, and read in their ears all the words of the book of the covenant,—so, still today, on the Sabbath the Torah is solemnly read aloud in every part of the land. And the clan-instinct of a few zealous elders, worshippers of Israel's past, ignoring the manifest destiny of modern law to be territorial, and forgetting the anachronism of the primitive rabbinical rules, still vainly strives to perpetuate the tribal Code of Moses amongst American institutions.



III 15—The Ark of the Law

Sources

Sources of Illustrations

1. *Map of Palestine.* From *W. D. Morrison*, "The Jews Under Roman Rule," plate 1 (New York, Putnam, 1890).
2. *Moses Breaking the Tables.* From the reproduction of the painting by *Robert Leinweber*, in the miniature series "Die Heilige Schrift", 2d ser., No. XI (Berlin, Kunstverlag Palette, 192–).
3. *Deuteronomy, Greek Script.* From the facsimile in *Henry A. Sanders*, "The Old Testament Manuscripts in the Freer Collection", the page showing c. 24, verses 1-4 (New York, Macmillan, 1917).
4. *Temple Palace of Solomon.* From the reproduction of the painting by *W. H. Lippincott*, in *H. H. Bancroft's* "Book of Wealth", section I (cited *ante*, chap. II).
5. *Solomon's Judgment.* From the reproduction of the painting by *Robert Leinweber*, in the series "Die Heilige Schrift" (cited *supra*), ser. 1, No. V.
6. *Doctor of the Law.* From a reproduction by *Newton & Co.*, London, of a drawing by *Eugene Burnand.*
7. *Jesus Arguing with the Doctors.* From a reproduction of the painting by *Heinrich Hoffmann* in the Dresden Gallery.
8. *Titus' Arch.* From a restoration of the sculpture on the arch.
9. *Talmud Text.* From the facsimile of the title-page of the Wilna edition of the Babylonian Talmud in *Michael L. Rodkinson*, "The Talmud" (translated), vol. X, p. 54 (New York, New Talmud Publishing Co., 1897-1903; now owned by the George Coleman Publishing Co., Boston).
10. *Treatise of Maimonides.* From a facsimile in the "Jewish Cyclopedia", vol. VIII, frontispiece (New York, Funk & Wagnalls, 1902-1912).
11. *Sheiar of A. D. 1236.* From a facsimile in the "Jewish Cyclopedia", vol. XI, p. 286, of the original in the British Museum.
12. *Marriage-Contract, A. D. 1795.* From a facsimile, in the "Jewish Cyclopedia", vol. III, p. 128, of the original in the New York Public Library.
13. *Certificate of Marriage, A. D. 1915.* From an original form furnished and translated by Israel Isaac Himmelstein, Esq., of the Chicago Bar, and printed by the Hebrew Publishing Co. (New York, 1915).
14. *Scroll of the Law.* From a reproduction by the McIntosh Stereopticon Co., Chicago.
15. *Ark of the Law.* From an illustration in the "Jewish Cyclopedia", vol. I, frontispiece.

III. Hebrew Legal System

Sources of Documents Quoted in Text

a. The Ten Commandments. From the version in ***Deuteronomy***, V, 7-22; the other version is in Exodus, XX, 3-17.

b. Deuteronomy, Greek Script. This contains vv. 1-4 of C. XXIV.

c. Samuel, XV, 2-6.

d. Solomon's Dream, I Kings, III, 5.

e. Solomon's Judgment, I Kings, III, 16-23.

f. Josephus Passage. From "Works of ***Flavius Josephus***", ed. Whiston, vol. II, pp. 512, 514 (2 vols., Phila. 1829).

g. Talmud passage; from the book Baba Metzia, part II, ch. VI, as translated in ***Rodkinson*** (cited *supra*), vol. VI, p. 201.

h, i, j. Charter, Bond, and Starr, in England. From *J. M. **Riggs***, "Select Pleas", etc. (cited *infra*), pp. XIV, 2, 11.

General References

Jewish Cyclopedia (cited *supra*).

*M. L. **Rodkinson***, "The Babylonian Talmud" (cited *supra*).

*A. R. S. **Kennedy***, "The Institutions and Legislation of Israel" (London, 1908).

*D. W. **Amram***, "Leading Cases in the Bible" (Philadelphia, 1905).

*Charles F. **Kent***, "The Messages of Israel's Lawgivers" (London, 1902), "Israel's Laws and Legal Precedents" (1907).

*M. **Schwab***, "Le Talmud de Jérusalem" (1871-1890, 12 vols.).

*J. L. **Kadushin***, "Jewish Code of Jurisprudence" (New York, 1915; 2d ed. Boston, 1921).

*S. **Mendelsohn***, "The Criminal Jurisprudence of the Hebrews" (Baltimore, 1891).

*J. M. **Riggs***, ed. "Select Pleas, Starrs, and Other Records from the Rolls of the Exchequer of the Jews" (Selden Society, vol. XV, 1902).

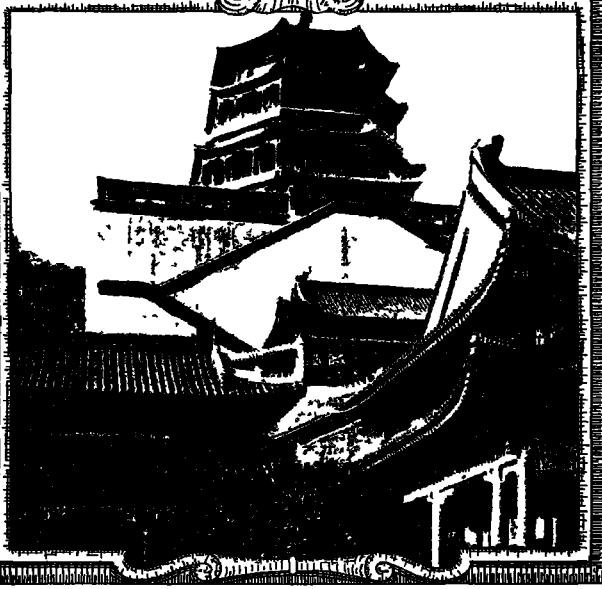
*Mayer **Sulzberger***, "Am-Ha-Aretz, the ancient Hebrew Parliament" (Philadelphia, 1910); "The Ancient Hebrew Law of Homicide" (Phila. 1915); "The Polity of the Ancient Hebrews" (Phila. 1912).

*I. H. **Levinthal***, "The Jewish Law of Agency" (New York, 1923).

*Henry **Schaeffer***, "The Social Legislation of the Primitive Semites" (New Haven, 1915).

*R. V. **French***, "Lex Mosaica" (London, 1894).

*George F. **Moore***, "Judaism in the First Centuries of the Christian Era: The Age of the Tannaim" (Harvard University Press, 2 vols. 1927).



THE CHINESE LEGAL SYSTEM

IV

The Chinese Legal System

(*I*) *Political Principles*

1. The third oldest system, and the only surviving old one—Conservatism and filial piety—Confucius' political philosophy.
2. Philosophy of justice.
3. A government of men, not laws—Absolute governors, responsible for producing popular contentment.
4. Conciliation before litigation.
5. Legislation based on popular custom and sentiment.
6. The laws penal in form.
7. Practical justice; the testimony of Perera the Portuguese.

(*II*) *The Old Legal System*

8. Early codes—the "Burning of the Books" —Tsing Code of A. D. 1650—Lu and Li—Texts on Adoption and on Mortgage.
9. Conveyancing—Mortgage deed of 1870—Registration of land-titles.
10. Court procedure.
11. Appellate justice—Precedents—Supreme Court opinions of A. D. 1827 and 1831 on adoption and marriage—Record of a trial for manslaughter in A. D. 1808.
12. Law-treatises—Imperial edicts—Judicial rescript — Legislative decree — Edict on stone.

(*III*) *The New Legal System*

13. Revolution of 1912—Constitution of 1923 —New codes—New Supreme Court decisions.
14. Durability of China's institutions.

IV. 1—Map of China

IV

The Chinese Legal System

THE third earliest legal system of the world, in origin, is the Chinese, beginning in history before B. C. 2500. Its unique distinction is that it is the only old one that has survived continuously to date —a period of more than 4000 years; in comparison, the other living systems of today are but children.

Through the centuries the Chinese nation absorbed several waves of conquest from the North;[1] and the massive gates and walls which still protect their great cities are a relic of the military struggles of the late Middle Ages. And it must be remembered that the Chinese themselves are a totally different race-stock from their successive conquerors, the Turanian Mongols, Tartars and Manchus.

(I) Political Principles

1. The sturdy survival of the Chinese as a people is due largely to their strong clan and family structure, which is equalled only by the Semites (the Chinese law, for example, recognizes one hundred and one degrees of relationship), and to their consequent conservatism, which by some observers has been miscalled "stagnation". In the grove of trees near his home,[2] Confucius expatiated to his disciples upon the ancestral customs. "I", he said,



IV. 2—Confucius and His Disciples Studying the Precedents

"am a transmitter and not a maker; for I trust and admire the men of former times". "Filial piety is the root of all good conduct. What is filial piety? It is the skilful carrying out of the wishes of our forefathers."

Confucius' philosophy, which is not a religion, but covers the whole range of personal morality and practical politics, has now pervaded Chinese life (in spite of the inroads of rival systems) for 2400 years. It rests on a passionate yet rational respect for those conventions which the experience of the past has verified. Confucius, one of the world's wisest men, was a chief justice about B. C. 500. He left only one grandson, but several thousand of his descendants are now living, and form the only hereditary aristocracy in China. Confucius was born in Kufu, in the province of Shantung; but spent his life in

至聖孔子像



IV. 3—Confucius

many provinces as a statesman, a philosopher, and a judge,—uniting in one man the careers of a Jefferson, an Emerson, and a Marshall.[3] One of his sayings has a deathless truth for us: "As a judge", he said, "I decide disputes, for that is my duty; but the best thing that could happen would be to eliminate the causes for litigation!"

2. The history and characteristics of the Chinese system of law and justice cannot be appreciated without taking into account the general philosophy of life that underlies it. In the following passage, a modern legal scholar lucidly summarizes that philosophy and points out some of its effects on ideas of law and justice:[a]

"Since the dawn of its history, China has believed in the existence of a natural order of things, or law of Nature, including all parts of the universe and adjusting them harmoniously with one another. This order of Nature was not made; it exists and is its own reason for existence. Humanity is a part of it, and must conform to it. And as the elements in this order of Nature are interdependent, whatever affects one element reacts on the others also. . . .

"The consequences of this theory in the field of government and of justice may be readily perceived; here are the most important:

"This natural law does not yield precedence to positive law, i. e. laws representing human experience and wisdom. Positive law ought to confine itself to translating the natural law into written formulas. If this translation is correct, the written law is good and binding; if the translation is incorrect, i. e. if the prince or the governor in formulating his decrees has misinterpreted the law of

nature, the written law is not binding. A Chinese will regard as binding a rule promulgated even by doubtful constitutional authority if he deems it conformable to 'the edicts from on High'; and he will deem himself free to disregard it if he finds it in disaccord with the natural law. The notion will not occur to him that the same act can be permissible or forbidden, good or bad, just or unjust, independently of its intrinsic moral quality and solely because the holder of political power has so labelled it. Thus the almost religious respect for positive law, marking our Occidental civilizations of Greco-Roman origin, does not exist in China.

"A consequence is that the positive law is observed only so far as it has received the effective assent of the community, i. e. has been consecrated by custom. . . .

"Furthermore, if we ask how one can determine in advance whether a rule of conduct will receive this popular sanction, it must be said that no exact answer can be given, because the Confucian philosophers never formulated or defined the natural law even in its broad lines; but that in general the Chinese look to Moderation, Humanity, Equity, as the governing idea for social relations. The conception of strict logical law, independent of the purpose in hand and the personality of the parties to a dispute, remains an alien notion. The Chinese does not conceive of an absolute right or wrong in law.

"It follows that in general, he seeks a middle road, the golden mean, a compromise which will 'save the face', an adjustment by settlement between the differing contentions. The magistrate, for the Chinese, is a friendly arbitrator, rather than a dominating authority bound to declare the law and to secure its respect. In the current practice of the interior districts, a court decision in a civil case is executed only when the losing party signifies his acceptance of it; for it would be contrary to natural law to use compulsion on a free mind.

3. *Men, Not Laws*

"And finally, since positive law is the expression of natural law, its violation, even of rules purely civil (as we should say), will involve at the same time a penal sanction, for it will be a branch of the preëxisting order of nature,—a transgression liable to cause dangerous disturbance in the community."

This philosophy of life, then, so different from the Occidental, leads to some special traits underlying all law and justice:

3. A marked contrast of the Confucian political philosophy with Occidental systems is that its fundamental maxim is emphatically "a government of *men*, not laws", the reverse of our own maxim; for the Chinese philosophy of government is that a good ruler makes a happy people:[b] "The Master said 'Let there be Men, and Government will flourish. But without the right men, government decays. Therefore the success of government lies in getting proper men. If you *lead* the people correctly, who will dare not to be correct? Hence the *institutions* of a ruler are rooted in his own character and conduct'". Thus Chinese political science relies on the wisdom and discretion of the ruler rather than on the text of laws.

It is indeed true that in the centuries just after Confucius (B. C. 400-200) a school of philosophers arose—known as the Legists—who repudiated entirely the doctrine of a government of men, in favor of the doctrine

of a government of laws; their expositions are powerfully reasoned, and would make good reading with us today. Under the Chin and the Han dynasties (about B. C. 200), for a century or so, this philosophy obtained the upper hand, and was effectively practised by able statesmen of that era. But its dominance was brief. It was but a passing episode. The Confucian principle, congenial as it is to the racial Chinese nature, was soon once more enthroned in Chinese government, and firmly maintained that place during the next two thousand years.

As a logical consequence, there was but a single official directly ruling each province or locality; and his yamen, or office,[4] was the all-inclusive center of local administration. The magistrate, or governor, had *all* authority,—dispensing justice, collecting taxes, officiating as political executive, as chief priest, and as moral guide and censor. In his judicial duties, he was of course assisted by a staff of clerks and advisers, learned in law and procedure. The governor was responsible to the Emperor at Peking, for maintaining law and order, and for keeping the people contented and prosperous, and was judged solely by results. Should he fail to find and punish the guilty person in a notorious murder or robbery, he was almost certain to be removed from office. Should a rebellion break out and be left unsuppressed, he was dis-



IV. 4—A Governor's Yamen, or Official Headquarters
The magistrate, or governor, had *all* authority,—dispensing justice, collecting taxes, and officiating as political executive, chief priest, and moral guide and censor

graced for life, and might even be forced to suicide by the fatal silken cord sent him for the purpose from the Emperor. But while he lived and was governor, his authority was sole and absolute, over millions of people. The idea of one-man rule was second nature with the Chinese people; so that when the ambassadors of the Dutch Republic visited Peking in A. D. 1795, their hosts expressed astonishment on hearing that there existed such a political monstrosity as a "republic". The Chinese governor was in his way a master-mind, a comprehensive man of the world,—a unique character, not paralleled in any other legal system.[5]



IV. 5—A Governor

4. Another notable consequence of the Confucian philosophy (or Chinese character) is that conciliation and mutual adjustment are looked upon as ideal elements of justice. "As a judge," said Con-

fucius, "I decide disputes, for that is my duty; but the best thing would be to eliminate the causes for litigation". The German jurist Puchta has concisely stated the antithesis between justice and law:

"The relationships of law are the relations of one man to another, and may be called legal relations. But the various human relationships do not enter, in their full extent, into the sphere of law, because the legal notion of a person rests upon an abstraction and does not embrace the whole being of man. There must, therefore, occur much modification and subtraction before we reach the special relations which alone are involved in the idea of a law. Thus, suppose a man has arisen from a protracted illness, and in order to pay the bill of his physician, to provide for the urgent wants of his family, due to his recent incapacity, and to procure the means of beginning business again, he goes to a well-disposed neighbor, whom he has helped in former times, and obtains a loan at the usual rate. How much of all this must we not leave out in order to ascertain the purely jural relations between the parties! Compare with this the case of the rich man who borrows capital merely to add to his possession by a new speculation, and consider the effort of abstraction which is required in order to assimilate the resulting legal relations. And yet the *legal* relations in these two cases are identical."

To the Anglo-Norman lawyer, accustomed to do homage to strict legal principle as in and for itself the "summum bonum" of law, and to regard legal justice as manifesting itself only in a system of unbending rules, this quotation will indicate better than anything else the great gulf that is fixed between his own system and that which was indigenous to China. By making generalizations into

hard-and-fast rules, by strictly eliminating in individual cases a variety of important moral considerations, the Anglo-Normans have succeeded in creating a special type of justice. This tendency of theirs is so strong that English Equity, the one great effort to counteract it, has become in the end identical in these respects with the whole system.

Yet there are peoples to whom this type of justice is utterly alien. The "struggle for rights", which the great German jurist, von Ihering, inculcated as the basis of civic law and order, is alien to Chinese thought. An unyielding insistence upon principle, and a rigid demand for one's due, are almost as reprehensible as a vulgar physical struggle. Moral force, and the "rule of reason", should control, rather than strict technical rights. Compromise is the highest virtue; intolerance and obstinacy, a mark of defective character. Nothing is so important that it cannot be compromised for human welfare or comfort or dignity. Hence the significance (so misunderstood by the Occidental) of "saving the face", i. e. of obtaining a respectable compromise in a dispute. Hence, also, the universal resort to mediation or arbitration, precedent to going to law, and usually removing that necessity.[c]

5. Related to this is another marked feature of China's legal system—the subordinate part played by the

letter of the law, and by legislation as such. The ruler should frame the laws to voice the best sentiments and wants of the people,—not to impose his personal will upon an unwilling people; else there can be no contentment. Confucius said: "When a prince loves what the people love and hates what the people hate, then he is what is called 'the parent of the people'." The imperial authority, though nominally supreme, is powerless to oppose national habits of thought. Thus, the mere enactment of a law, and the mere letter of its text, are in themselves not vital. The law should reflect custom and public opinion. If a local governor finds or introduces a commendable usage, he may send an account of it to the ministry at Peking; the minister submits it to the supreme council, and if approved, it is notified to the other provinces. If another governor accepts, it can become law there at once; if it is generally accepted elsewhere, it is put into the code, but does not necessarily become strict law until it is generally familiar. This is the "rule of reason" applied to legislation.

Thus the political system of personal discretion and one-man rule—from emperor down to magistrate—is apparent only. It would mislead the Occidental student who did not realize that every important official act or measure is in fact more or less controlled, indirectly, by

public opinion. The strike, the boycott, even the riot, may become the extreme but normal indices of this opinion. As a most experienced observer has summed it up: "The Chinese are the most law-abiding people on the face of the globe—but the laws by which they will abide must be laws of which they approve." In 1927, Mr. Ku Hung-Ming, one of China's "elder statesmen," on being asked about democracy for China, thus replied: "It has been well said that the best form of democracy for China is a despotism tempered with the rights of the people."

6. Still another consequence of the general principle is that the code of imperial laws (apart from the purely administrative organization) is in form a penal code. There is no formal distinction between criminal and civil law; almost every chapter or section ends with a statement of the penalty for its violation. All private 'rights' (as we call them) have a public interest, in that their violation may lead to brawling and injustice and public discontent, and may therefore be repressed by penalties. This principle rests on the still broader truth that there is no distinct line between morality and law. If a rule has become so settled and obvious that it has arrived at a place in the code, it *ought* morally to be obeyed by all; and the few who may resist must naturally be coerced by a penalty; they merit it.

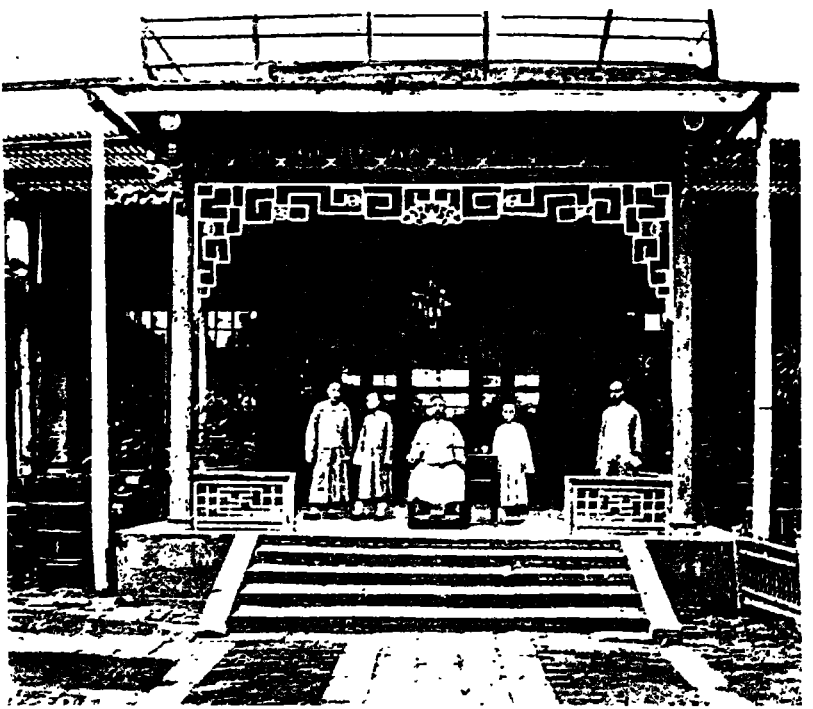
6. *Penal Laws*

It can be understood, from the foregoing traits, that the general body of formal legislation does not play the same part, in the legal system at large, as in the Occident. The law was to be a ready instrument in the hands of benevolent and experienced rulers. It might be expanded or modified to suit a higher sense of equity. In such a system of government one half of the success was to depend upon the skill and justice of the individual official, and the other half upon the detailed provisions of the laws.

7. Nevertheless, it cannot be doubted that (as in ancient Greece, where for different reasons an analogous condition is found) the Chinese system was one of effective law and order. All observers, since the earliest records, describe the Chinese people as notably law-abiding and peaceful. A Portuguese writer at Macao, about A. D. 1590, declared, "It is a world to see in what equability and indifferency of justice all of the Chinese do live their lives, and how orderly the public laws are administered". Sir George Staunton, the British diplomat who translated the Code of Tsing, in pronouncing upon "some positive moral and political advantages" of the Chinese constitution, attributes these advantages "lastly, to a system of penal laws, if not the most just and equitable, at least the most comprehensive, uniform, and suited to the

genius of the people for whom it is designed, perhaps of any that ever existed."

That the dispensation of justice under this system, in spite of its peculiarities, may merit comparison with other systems in its methods and results, is amply testified to by the verdict of foreign observers in all periods.[6] An Arab traveler of A. D. 850, the first eye-witness to leave a



IV. 6—A COURT-HOUSE

record, says that the Chinese "administer justice with great strictness in all their tribunals." A striking instance is one chronicled by Perera, the Portuguese merchant, in Macao about A. D. 1560. Perera's party had been mistaken for pirates; were arrested; resisted; and some Chinese deaths resulted. The strangers were then charged, first with piracy, and secondly with resisting officers. But their true character was vindicated at the trial; the officers who unjustly arrested them as pirates were disgraced; and the individuals who had done the killing were found guilty of homicide. Perera thus comments on the kind of justice his party received:[d]

[*A Foreigner's Experience as Accused in a Chinese Court.*] "I shall have occasion to speake of a certaine order of gentlemen that are called Louteas. I wil first therefore expound what this word signifieth. Loutea is as much to say in our language 'Sir' Such Louteas as doe serve their prince in weightie matters for justice, are created after trial made of their learning. Now will I speake of the maner which the Chineans doe observe in doing of justice, that it may be knowen how farre these Gentiles do herein exceed many Christians, that be more bounden then they to deale justly and in trueth In the principall Cities of the shires be foure chiefe Louteas, before whom are brought all matters of the inferiour Townes, throughout the whole Realme. Divers other Louteas have the managing of justice. These Louteas do use great diligence in the apprehending of theeves, so that it is a wonder to see a theefe escape away in any City, Towne or village.

"The Louteas observe moreover this: when any man is brought

before them to be examined, they aske him openly in the hearing of as many as be present, be the offence never so great; thus did they also behave themselves with us. For this cause amongst them can there be no false witnesse, as dayly amongst us it falleth out. This good commeth thereof, that many being alwayes about the Judge to heare the evidence, and beare witnesse, the processe cannot be falsified, as it happeneth sometimes with us Againe, these Louteas, as great as they be, notwithstanding the multitude of Notaries they have, not trusting any others, do write all great processes and matters of importance themselves. Moreover one vertue they have worthy of great praise, and that is, being men so wel regarded and accompted as though they were princes, yet they be patient above measure in giving audience. We poore strangers brought before them might say what we would, as all to be lyes and fallaces that they did write, ne did we stand before them with the usuall ceremonies of that Countrey; yet did they beare with us so patiently, that they caused us to wonder, knowing specially how litle any advocate or Judge is wont in our Countrey to beare with us. For wheresoever in any Towne of Christendome should be accused unknowen men as we were, I know not what end the very innocents' cause would have. But we, in a heathen Countrey, having our great enemies two of the chiefest men in the whole Towne, wanting an interpreter, ignorant of that Countrey language, did in the end see our great adversaries cast into prison for our sake, and deprived of their Offices and honour for not doing justice,—yea not to escape death: for, as the rumour goeth, they shal be beheaded."

Names of able magistrates, like Pao Lung-Tu and Lan Lu-Chow, have been handed down with reverence for centuries in popular fame. And the Chinese trial magistrate, at his best, developed a high degree of professional skill—that skill which has always in the Orient commanded the wonder and admiration of the multitude,

—a combination of intuition and experience in discriminating between guilty and innocent without the aid of a formal system of proof. Modern testimony to this is borne by an eminent British consular officer, the best informed observer of Chinese justice:[dd]

"The singular keenness of the mandarins, as a body, in recognizing the innocent and detecting the guilty (that is, when their own avaricious interests are not involved) makes the contingency [of a false confession under violence] so rare as to be almost unknown. A good instance came under my own notice at Swatow in 1876. For years a Chinese servant had been employed at the foreign Custom House to carry a certain sum of money every week to the bank, and at length his honesty was above suspicion. On the occasion to which I allude he had been sent as usual with the bag of dollars, but after a short absence he rushed back with a frightful gash on his right arm, evidently inflicted by a heavy chopper, and laying the bone bare. The money was gone. He said he had been invited into a tea-house by a couple of soldiers whom he could point out; that they had tried to wrest the bag from him, and that at length one of them seized a chopper and inflicted so severe a wound on his arm, that in his agony he dropped the money, and the soldiers made off with it. The latter were promptly arrested and confronted with their accuser; but, with almost indecent haste, the police magistrate dismissed the case against them, and declared that he believed the man had made away with the money and inflicted the wound on himself. And so it turned out to be, under overwhelming evidence. This servant of proved fidelity had given way to a rash hope of making a little money at the gaming table; had hurried into one of these hells and lost everything in three stakes; had wounded himself on the right arm (he was a left-handed man), and had concocted the story of the soldiers, all within the space of about twenty-five minutes. When he saw that he was

640, issued a code of some 500 articles. The Tartar emperor Timur (grandson of Kublai Khan) about A. D. 1320, promulgated a code of 2500 articles. But none of the conquerors from the north attempted to alter essentially the traditional laws and customs of the Chinese. The great Tartar ruler, Kublai Khan ("In Xanadu did Kubla Khan A stately pleasure-dome decree"), who conquered China about A. D. 1260, founded the Yuen dynasty, and established Peking as his capital city, proclaimed that "the doctrine of Confucius was a law destined to govern all generations, ... and all should conform strictly to its divine behests; for the state's laws are constant and invariable, and must be obeyed as the rule of conduct for all." The most radical innovation attempted by the all-powerful and broad-minded Kublai Khan was the introduction (A. D. 1269) of an alphabet, especially constructed on his order by a Tibetan scholar, to supplant the multifarious Chinese ideographs; and the very decree above, confirming the traditional laws, was promulgated in this alphabet.[8] But solid Chinese habit and thought was proof against even this change; and after his death its use gradually lapsed.

In the ensuing (native) Ming dynasty, about A. D. 1400, the minister Yung Lo framed a new general code; and on this code was founded that of the next (con-

IV. 8—Kublai Khan's Decree, A. D. 1269

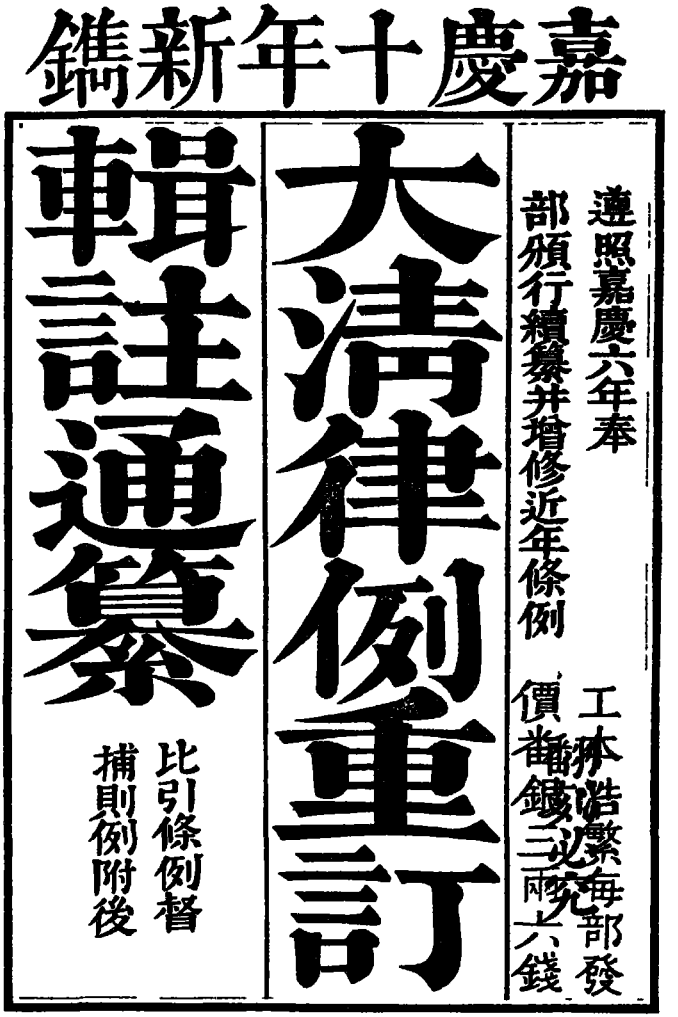
This conqueror confirmed the institutions of Confucius, but attempted in vain to introduce, by the same decree, the use of an alphabet specially invented, to supplant the multifarious ideographs

quering) Manchu dynasty, the Tsing, some two centuries later. This Ta Tsing Lu Li, or Code of Tsing, became law about A. D. 1650, and endured until the revolution of A. D. 1912.[9]

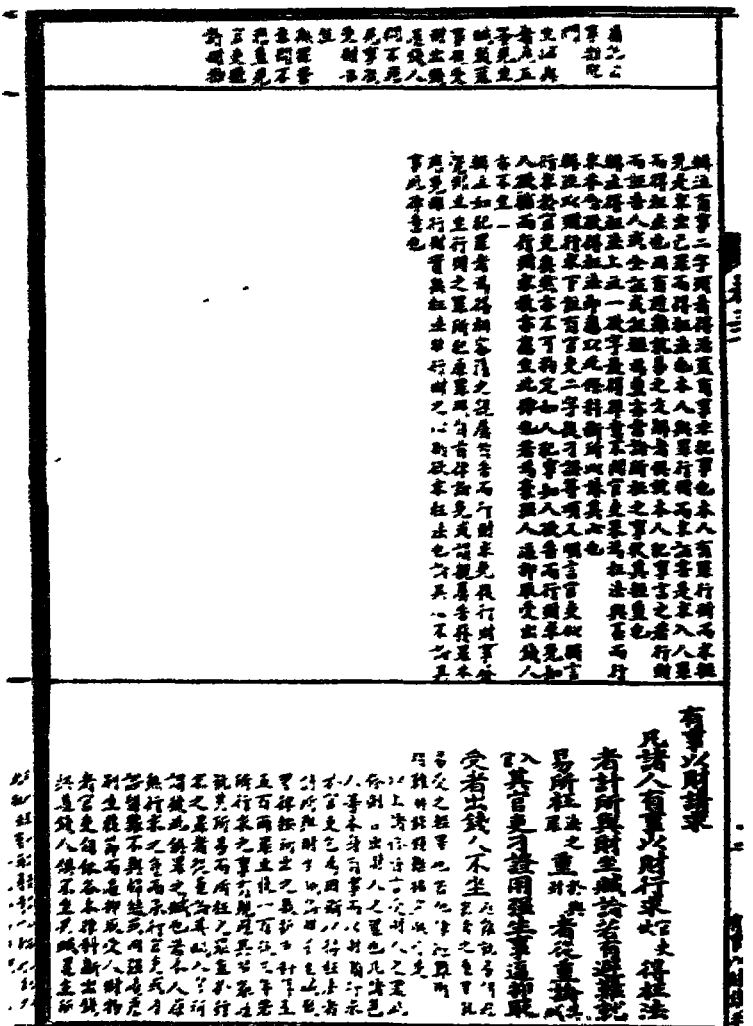
This work consists, first of a code proper, called *Lu*, the text of which never changed; and secondly, of the annual edicts and judicial decisions, called *Li*, which interpreted the Lu, made them flexible, and adapted them to progress,—much like the function of Equity alongside the Common Law. There were about four hundred and fifty Lu sections, and (in the edition of 1907) about two thousand Li sections. The page (reading downwards, right to left) shows the Lu, or fixed constitution, printed in the lower space; the judicial rulings are seen above; and the Li, or annual modifications, are printed in the middle.[10] Every five or ten years a new edition was promulgated, with these interpretations inserted cumulatively at the code sections, thus bringing the system up-to-date,—a method not unlike the one followed in imperial Russia since 1860, and now, in part, in Wisconsin.

The following passages of the Lu, on the law of Adoption, illustrate the style of this code:[11]

[*Code Provisions on Adoption.*] "Whoever appoints his heir and representative unlawfully, shall be punished with 80 blows.—When the first wife has completed her fiftieth year, and has no children living, it is allowed to appoint the eldest son by the other



IV. 9—Ta Tsing Lu Li (Code of Tsing), A D. 1650
This code, shown in its title-page, endured till the revolution of A D. 1912



IV. 10—Code of Tsing (Interior Page)
The Lu, or original fixed laws, are printed in the lower space; the Li, or annual modifications, are in the middle; and the judicial rulings are above. The text reads downward, right to left, in each division

wives to the inheritance; but if any other than the eldest of such sons is so appointed, it shall be deemed a breach of this law.

"If a person, not having sons himself, educates and adopts the son of a kinsman, having other sons, but afterwards dismisses such adopted son, such person shall be punished with 100 blows, and the son shall be sent back to, and supported, as before, by the adopting parents.

"Nevertheless, if the adopting parents shall have subsequently had other sons, and the natural parents, having no other, are desirous of receiving their son back again, they shall be at liberty so to do.

"Whoever asks for, and receives into his house as his adopted son, a person of a different family name, is guilty of confounding family distinctions, and shall therefore be punished with 60 blows; the son so adopted shall, in such cases, always be returned to his family.—In like manner, whoever gives away his son to be adopted into a family of a different name, shall suffer the punishment decreed by this law, and receive such son back again. Nevertheless, it shall be lawful to adopt a foundling under three years of age, and to give the child the name of the family into which it is adopted; but such adopted child shall not be entitled to the inheritance upon failure of the children of blood.

"If the relative appointed to the inheritance, on failure of children, is not the eldest in succession, it shall be deemed a breach of this law; the relative so appointed shall be sent back to his place in his own family, and the lawful heir appointed in his stead."

The following passage, from the law of Mortgage, illustrates the way in which the Li (or annotations) served to apply, interpret, and modify the Lu (or fixed text).[f]

First comes the Lu:

"[1] Whoever takes lands or tenements by way of mortgage, without entering into a regular contract, duly authenticated and assessed with the legal duty by the proper magistrate, shall receive 50 blows, and forfeit to government half the consideration money of the mortgage.

"[2] If the mortgagor does not transfer to the mortgagee unreservedly the whole produce of the land upon which the taxes are charged and made payable to government, he shall be punished in proportion to the extent of the property, in the following manner: if from one to five meu, with 40 blows, and one degree more severely for each five additional meu, until the punishment amounts to 100 blows; the land so illegally mortgaged shall be forfeited to government.

"[3] If the proprietor of lands and tenements already mortgaged attempts to raise money thereon by a second mortgage, the amount obtained upon such false pretences shall be ascertained, and the offender punished accordingly, as in the case of an ordinary theft, to the same extent, except that he shall not be liable to be branded.

"The pecuniary consideration received by the fraudulent mortgagor shall be restored always to the mortgagee, unless such mortgagee is himself privy to the unlawfulness of the transaction, in which case it shall be forfeited to government. The said mortgagee and the negotiator of the bargain, when either of them is acquainted with the unlawfulness of the transaction, shall moreover receive the same punishment as the mortgagor. In all such cases, the first and lawful mortgagee shall remain in possession.

"[4] If, after the period specified in the deed by which any lands or tenements are professed to be mortgaged or pledged by the proprietor, is expired, the said proprietor offers to redeem his property by the payment back of the original consideration upon

which he had parted with it, it shall not be allowed the mortgagee to refuse to comply; any instance of such refusal shall subject him to the punishment of 40 blows, and to the forfeiture of all the produce of the land which he may have reaped after the expiration of such period. Nevertheless, this law shall only have effect when the proprietor is really able at the expiration of the prescribed period to redeem his lands, and not otherwise."

Next comes the Li (or, annotations), and here we show a part of the Li of 1799 and the Li of 1907 in comparison;[g] they both deal with paragraph 4 only of the above text, on the mortgagor's right to redeem or receive the surplus value. (It will be remembered that, in the evolution of mortgage law in every system[h] the early stage entitles the mortgagee on default at the time appointed, to keep the entire property pledged, no matter how excessive its value; while in the later stages (here represented in the Chinese rules) the law compels the mortgagee to restore to the mortgagor the excess over the amount of the original loan):

[*Edition of 1799.*] "When it is expressly declared in the preamble of a deed of sale, that the land is sold absolutely, and not by way of pledge or mortgage, and there is no subjoined clause providing for the contingency of a further payment to the seller, as a consideration for his making the sale absolute at a

[*Edition of 1907.*] "Amending Edict of year 6, Emperor Chia-Tsing [1801]. If the deed is a sale absolute in form, without any clause for redemption, the original owner is forbidden to make any claim at a subsequent time for redemption; such a claim shall subject him to punishment. And if the owner

subsequent period; such a deed of sale shall be an effectual bar against all claims whatsoever of redemption. But if the sale is not expressly declared to be absolute, or if there is a general clause of redemption, or a specific one of redemption at any time after the expiration of a certain period, the original proprietor shall, according to the terms of the agreement, be entitled to recover his land, upon repayment of the consideration for which it was pledged or mortgaged. If the original proprietor, at the end of the period specified in the contract, is still unable to discharge the mortgage, it shall be at his option, either to retain his right to a recovery of his land, at any future period, or to surrender it, and make the sale absolute, in consideration of a receipt of a further sum to be agreed upon between him and the mortgagee, or between arbitrators duly appointed by the parties. If they cannot agree upon the terms, the mortgagee shall have the option of either continuing in possession, or of re-imbursing himself, by re-mortgaging the of land sold with a clause for redemption makes claim for redemption before the time stipulated in the deed, he shall be subject to punishment."

Judicial Ruling [undated]. "The maximum period for land sold on mortgage shall be 10 years. If the period specified in the deed exceeds this limit of 10 years, the clause is of no effect, and the parties privy to it are punishable."

land to some other person, the right of redemption remaining as before with the actual proprietor.

"It is however declared that all deeds of sale which are doubtful, or imperfect, owing to the tenor of the preamble, but which contain no clause of redemption, shall, if not questioned or objected to for thirty years from the date thereof, become to all intents and purposes absolute."

9. Two documents from the 1870's, under the foregoing chapter of the code, will illustrate the degree of skill developed in the conveyancing of Chinese land.[i] It may be noted that a Chinese deed can be executed with the same expedient as our own "indenture", i. e. the grantor signs an original and the grantee a counterpart, and then the word "contract", or the like, is written in large characters so that one half appears on one document, the other half on the other. The following documents are the grantor's originals of a mortgage, consisting first of a deed of sale with condition subsequent for re-purchase, and next, after several years, of a release:

[*Mortgage-Deed and Release.*] *Original Mortgage.* "I, Tsien Yi, and my younger brother, Ping, signers of this original mortgage of land and house, finding ourselves in need of money for an honor-

able purpose, and having employed as brokers Doe and Roe for the purpose of arranging terms, are on due reflection fully decided to deliver in mortgage to the church known as Chong-Yi, as a property for the common use of the Catholic Mission in this country, for the sum of ounces of pure silver weighing, the current rate for mortgage transactions, the house and land hereinafter described, which were devised to us by our forefathers. (1.) The house includes: (a) a dwelling of stories and rooms from top to bottom; (b) a second dwelling formed by the large reception room and adjacent rooms, ... rooms in all; (c) wings, in stories, east and west, having the two said dwellings between them, and numbering rooms; (d) a small service-building, of rooms, behind the east wing; (e) a flower garden behind the service-house, in which is a summer-house, in stories, and a garden-house, in all rooms; (f) and lastly another building, one storied, ... rooms. Total number of rooms, ..., including large and small, and upper and lower stories. Walls to the estate, doors and windows, the partitions (both wood and brick), rockeries, stone garden-steps, trees and flowers, bamboo groves, kitchen, wells, latrines, all the aforesaid are complete; we are to prepare in duplicate a list of these appurtenances. (2.) The premises of the said house and garden, with an additional plot belonging thereto, include acres and tenths of an acre, and are located in the district of at the street and bounds as described hereinafter.

"(3.) The money has been paid and the deeds delivered at the same time, without any reservation of amounts to pay charges thereon. It is agreed that no interest will be payable on the money received, nor rent payable on the premises; that the term of tenure shall be nine years; that during that period the new owner may deliver the said premises in mortgage to another person for the same amount; that, on the expiration of this period I may buy back my property on repayment of the same amount; that if at that time

I have not the money, I cannot oblige the new owner to pay the excess value and accept a complete and final title.

"(4.) The said land and house are hereby declared to be owned by us, and no relative, whether ascendant or descendant, has any claim to it; nor has there been any sale to other persons; if any claim to the contrary shall be made, it will be settled by us, we holding harmless the new owner. (5.) From the date of this deed, the new owner shall enjoy the property, either by living on it himself or by leasing it to others for hire.

"The foregoing is agreed to by both parties, and neither has any other terms to make. For future proof of the transaction we have executed this original mortgage of the land and house in testimony thereof.

"In particular:

"The house, facing the south, is located on the north side of street, in the county, town, ward The four bounds are: on the east, to the middle of the alley; on the south, to the street; on the west, to the land of, and, on the north, to the middle of the canal.

"The government approval of the deed to the grantor, and the official certificate of title [see *post*], of the said land, as well as all preceding deeds of the prior owner, having been lost through a series of family misfortunes, in place thereof the 'substitute deed' [see *post*] issued by the magistrate at our request, as well as stamped receipts for taxes of prior years, have been delivered to the new owner.

"It is agreed between the parties that the new owner shall make all repairs of gutters and other minor repairs; but that if timbers by rotting break, or if either walls or partitions give way, the new owner shall advance the cost of the needed repairs, the reasonable amount to be later determined by arbitration, and to be entered plainly on the mortgage deed, for reimbursement by the original

owner in case of re-purchase of the property. It is also agreed that the new owner may in his discretion add to or change the decorations, but that at the time of re-purchase he shall restore the house to its original condition.

"Year of the emperor Koang-shu, month, day, I Tsien Yi, and my younger brother, Ping, have executed this original mortgage of house and land. [Then the signatures of the brokers, the head of the clan, and the notary. On the last line, a declaration that the grantors confirm the contract. Then the half of the characters forming the indenture.]

[*Release.*] "I, Tsien Yi, and my younger brother, Ping, signers of this irrevocable sale, having already, through the brokers and, in year of the Emperor Koang-shu, transferred in mortgage, for the sum of ounces silver received in hand, to the church known as Chong-Yi, as a property for the common use of the Catholic Mission in this country, a house situated in the district of, on street, in the county, town, and ward hereinafter mentioned, having in all rooms, upper and lower stories included, together with the premises of the said house, the flower garden, and a piece of ground adjacent, measuring in all acres of land, being a property inherited from our forefathers; And having afterwards, in year, received a supplementary amount of ounces silver, and in both cases having executed deeds to the new proprietor [the second document of the series is here omitted]: Now therefore, finding ourselves in need of money for a pressing purpose, we have again requested the brokers to arrange the terms of a final irrevocable sale of the house and land aforesaid, which we have decided to make, for the sum of ounces of pure silver, full weight of, the actual amount of the final irrevocable sale, fixed upon reflection. The full exchange of money and deeds has been made at the same time on the date of this instrument, no other receipt having been given by us. We have also delivered to the new owner the counterpart of the original

mortgage-deed and the detailed inventory of ornaments and repairs of the house received from him at the time of the original contract. From and after the date of this final irrevocable sale of this property, it shall no longer be lawful for us to claim either the right of repurchase or any further supplementary amount; the new owner, on his part, will at such time as he sees fit register the transfer of title and pay the tax; he shall have the right to demolish and rebuild the house; in short, he shall be the absolute owner. The said land and house are hereby declared to be owned by us, and no relative, whether ascendant or descendant, has any claim to it; nor has there been any mortgage or sale to other persons, nor any reservation of any part of the price of this sale to discharge debts, or the like. If any claim to the contrary shall be made, it will be settled by us, we holding harmless the new owner. This is our free act, and we have no other terms to make. Fur future proof, we have executed this final irrevocable sale of the land and house in testimony thereof.

"In particular:

"The premises of the house, facing the south, are situated on the north side of street, in the county, town, ward The four bounds are plainly described in the original deed. Upon delivery of this instrument to the new owner, we have received from him ounces of silver, in full payment of this irrevocable sale.

"In year of the Emperor Koang-shu, month, day, I Tsien Yi, and my younger brother, Tsien Ping, have executed this instrument of irrevocable sale of land and house. [Etc. as before.]"

It would be a mistake to suppose that the great age and apparent conservatism of the Chinese system are inconsistent with change and timely progress; their decennial re-edition of the code would disprove this. And an-

other example is seen in the fact that the Torrens method of registering title to land (instead of merely recording deeds), though new among us, has been in force in China for at least 150 years. Every Chinese land-owner has his official certificate of title, which is indisputable.[11]

At the records office an entry of the land is made at the time of first issuing the certificate. When a piece of land is sold, the certificate of title is delivered to the new proprietor, and at the foot of the contract is noted the delivery of the certificate; thus the same certificate passes from hand to hand, with the transfers of the plot of land. A party selling only a small part of the land covered by this certificate does not deliver the certificate to the buyer, but executes a deed termed "supplementary deed" or "partition deed"; on the certificate is noted, with an attestation clause, the vendee's name, the date, and the description of the portion sold; and on the deed of sale is noted why the vendor, who keeps the certificate, has executed only a bill of sale. But if the sale covers more than half of the original plot, the vendor must deliver over his certificate, and then it is the buyer who executes a "supplementary deed", and at the foot of the certificate is added a clause describing what portion of the land is retained by the vendor. The deed itself in such cases is merely an extra precaution; the partition must be



憲 道 清田執業方單

欽辦衙捕用直隸州署松江府正堂金 爲清賦便民給單執業事案照奉 憲清賦同治二年曾經設局辦理後時急停放假致蒙 徹底釐正現經本縣詳 撥章程 禀請 查照辦理 布政司應 批飭即發前章程分別辦理務使戶戶相符田歸有着等因又奉 督辦蘇省全書總局 憲布政司應 批飭全書總局核議具詳 飭遵 憲經理會同 會同照辦並奉 憲臺 批飭全書總局核議具詳 飭遵 憲經理會同 憲臺 批飭部院張 批飭全書總局核議具詳 飭遵 憲經理會同 憲臺 批飭部院丁 批所議清理田糧卽正戶名辦法尚爲周妥等因奉此查賦不清由於版冊所流現在就田問業清釐賦之源就業撥糧永杜捆櫃之累如業田今歸在各保各圖仍按照版圖章程分保分圖核立的戶不使紛歧以除挽弄花分積弊碉值民間買賣卽以此單爲憑田隨單轉單隨現業成交之後遵照 巡撫部院丁 札飭以單與串驗過到不准戶書經承人等弄爲分立號戶致壞清釐成法凡從前舊單概作廢紙此後過有田土涉訟如無此單卽不准理除將單式詳明各大憲立案一面勒石永遵外合將該業保圖坵號畝分科則詳列於後永爲執業順至單者

計開

坐落 縣 保 圖 鄉 字坵 號 田

的業 系

同治 年 月 日給

IV. 11—CERTIFICATE OF LAND-TITLE, ABOUT A. D. 1850
This certificate passes from hand to hand, with transfers of the plot of land, and is indisputable

duly noted on the certificate, or else the title of the holder remains absolute and complete. In case of loss or destruction of the original certificate, a new original is not issued; but, after certain proceedings had, a "substitute deed" is used, which passes from hand to hand like the original certificate.

The following form of official certificate of title was issued for Shanghai land in the 1850's:[j]

[*Certificate of Title.*] "We the secretary of the treasury of the province of Kiang-su deliver these presents as a certificate of title required by law. . . [Then follows a brief recital of the history and purport of the law.] We have received from the owner named below a petition that the plot below described be recorded with the lands subject to tax; the local magistrates have investigated the petition and the land described; they have recorded it, and have sent us a final report thereon; we have reported this to the governor of the province, who has answered consenting to classify the land in question, and to begin to receive taxes thereon. Wherefore, we are authorized to deliver to the farmer this certificate. This document is given in proof thereof.

"Entries to be made:

"The farmer, in the district, has filed a petition declaring that he desires to validate acres and parts of an acre of land. The plot will pay tax at the rate of bushels of rice per acre, and will begin to pay from year The boundaries of the plot are: on the east to, on the west to, on the south to....., on the north to
Done in the year of the Emperor Hien-fong, ... month, ... day."

10. Court Procedure

10. The procedure of the trial courts, at the end of the 1500's, has been graphically summarized in the observations of some Spanish missionaries. Their account shows candid admiration for the methods of Chinese courts:[k]

"The king doth pay the judges all sufficient wages, for that it is forbidden upon great penalties to take bribes or any other thing of any clyent. Likewise the judges be straightly charged and commanded (and that is one of the chiefest articles that is given them from the council), not to consent to be visited of any clyents in their houses. Neither can they pronounce any sentence but in the place of publike audience, and in the presence of all the officers, and it must be done in such sort that all men that are in the place of audience may heare it, and is doone in this sort following:

"The judge doth set himselfe in the seate of justice, then do the porters put themselves at the entring or doores of the hall, who do name with a lowde and high voice the person that doth enter in to demand justice, and the effect of that he doth aske. Then the plaintife doth kneele downe somewhat a far off from the judge, and doth with a loud voice declare his griefe or demand, or else in writing. If it be in writing, then one of the scriveners or notaries doth take the petition and doth read it, the which being understood by the judge, he doth straightwaies provide upon the same that which is agreeable unto justice, and doth firme the petition with his own firme with red inke, and commandeth what is needful to be done. These matters being executed in publike (which is marvelously observed and kept), it is not possible that any of the officers should take any bribes, but it must be discovered by one of them; and for that they are used with great rigour in their residence, everie one is afraid of his companion, and are one to an other (in this case) great enemies.

IV. Chinese Legal System

"In all matters of lawe, as civill as criminall, the judges do nothing but by writing, and do pronounce the sentences, and examine witnesses in publike, before all the rest of the officers, because no subtilty nor falshood shall be used in their demaundes, neither in their writings, to set downe other then the truth. Everie witnesse is examined by himselfe, and if he do double in his declaration, then do they joyne together and make their demaunde from one to an other, til by their striving they may come to a better knowledge of the truth. But when by these meanes they cannot bring it to light, then doo they give them torments to make them confesse, beleeving that without it such persons as have experience and knowledge will tell the truth.

"In matters of great importance, and such as doo touche grave personages, the judge will not trust the scrivener or notarie to write any information; but they with their owne handes will write the declaration of any witnesse, and will consider verie much of that which is declared. This great diligence is the occasion that fewe times there is any that doth complaine of any ill justice doone; the which is a great and notable vertue, and ought to be imitated of all good justices, for to avoyd many inconveniences which doo happen for the not using the same, the which these Gentiles have great care to performe."

11. There were no lawyers (as we understand the term) in the Chinese system. There were notaries, and brokers who acted as attorneys; but no licensed professional class, either of advocates or of jurisconsults, as at Rome. But well-informed observers tell us that all Chinese are fairly well acquainted with both the customary and the statute law, owing to the fidelity with which the laws reflect the common usage. And the local magis-

trate's justice, when he was in doubt, could be reviewed in an elaborate system of appeals,—from district to province, and thence to the capital at Peking.

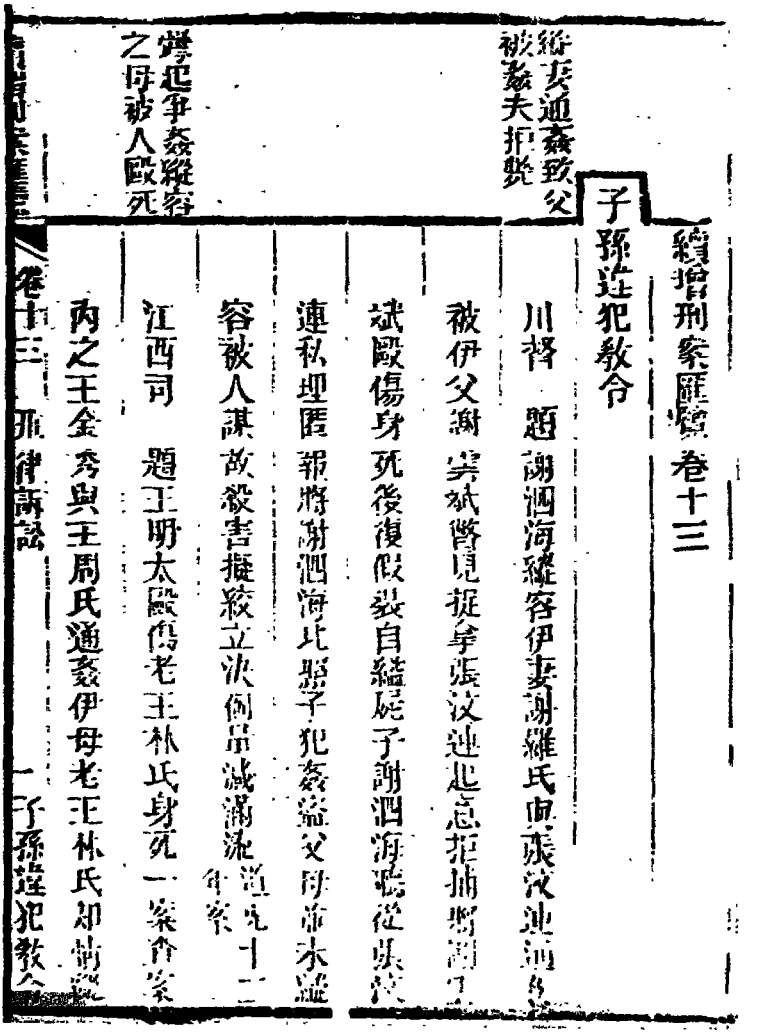
There sat the Supreme Court, in the Imperial palace-city; and this body of men, learned in the law, revised the lower court rulings. The opinions show as keen and logical distinctions as those of any court in the Occident. From time to time, collections of leading decisions of the Supreme Court,[12] were published and studied as precedents,—in Chinese words, Hsing An Hui Lau. Every magistrate had to possess a copy of this book. Here are a few illustrative decisions from the last century:[1]

[*Supreme Court Decisions.*] *Lee's Case:* "Seventh year of the Emperor Tao Kwang [1827]. One Lee Szu, being the nearest relative of Mrs. Lee, a widow, had been adopted as the son of Mrs. Lee, forty years ago. Afterwards, Lee Szu was convicted of manslaughter and sentenced to be banished accordingly.

"Mrs. Lee appealed for pardon upon the ground that Lee Szu was her only heir, so that his banishment would have left her without a legal heir. It also appeared that she was very old, about 71 years of age.

"[Held] It has been the general law of this country that the adoption, as son, of a person not having the same family name as the adopting party, is absolutely illegal.* The adopting party is subject to criminal punishment, and the adopted party must return to his original family. And further, if there is no direct issue of the body, the nearest relative having the same family name is entitled

*[This law has been quoted *ante*, in the text, par. [4] of the passage on Adoption. For the reason of this rule, see the book of Wilkinson, cited *post*.]


續增刑案匯覽 卷十三
子孫違犯教令
川督 題 謝泗海縱容伊妻謝羅氏與張汉連通
被伊父撞 實斌醫見捉拿張汉連起意拒捕將
斌毆傷身死後復假裝自縊屍子謝泗海聽從
連私埋匿報將謝泗海比照子犯姦盜父母律
容被人謀故殺害擬絞立決倒量減滿流道光十二
年案
江西司 題 王明太毆傷老王林氏身死一案會
內之王金秀與王周氏通姦伊母老王林氏知情
縱容通姦致父被姦夫扼斃
鬥毆爭姦縱容之母被人毆死
卷十三 刑律訴訟 一 子孫違犯教令

IV. 12—A Page from a Volume of Supreme Court Decisions

to be instituted as heir. In the present case, Lee Szu was the only relative having the same family name of Mrs. Lee. [Hence no other person could be lawfully adopted by her.] So therefore, to banish Lee Szu would tend to put Mrs. Lee, in view of her old age, in an extremely grievous and deplorable condition.

"Pardon is granted."

Wong v. Kwa. "Tenth year of the Emperor Tao Kwang [1830]. Mr. Wong contracted with Miss Kwa to marry. Subsequently, Mr. Wong departed the country to Harmi, to carry on business there, and did not return to his hometown until about ten years later. In the seventh year of Wong's absence, Miss Kwa, with knowledge that Wong was in Harmi, married a third person, in spite of the contract to marry with Wong. Mr. Wong, returning home after the said marriage, demands the specific performance of his contract of marriage.

"[Held] Specific performance is granted, upon the ground that the marriage with a third person was void because of bad faith, even though the marriage has been consummated and a son been born to her. As a general rule, a continued absence for three years, without being heard of, may raise a presumption that the absent party is actually dead, and in such case a girl [under contract to marry the absentee] may lawfully be married to a third person, upon getting a license from the magistrate, as if she were never engaged. But the present case is not within this rule; for though Wong was absent for nine or ten years, yet his whereabouts was known to the other party.

"Specific performance is decreed."

There were special series of (what we should call) criminal decisions; and a favorite type of book for popular reading was a collection of famous cases, like our collections of "causes célèbres", common in Europe in the

last century. The following report of a homicide case of a century ago illustrates the method of investigation and the process of appeal, as well as the principle of law involved; the original is a communication (dated 1808) from the Mayor of the port of Canton, transmitting to the Chinese Merchants' Guild a copy of the Supreme Court's decision:[m]

[*Record of a Homicide Appeal.*] [*Mayor's Letter.*] "I have received information from His Excellency the viceroy to the following effect:

[*Viceroy's Letter.*] "On the 26th of the first moon of the 13th year of Kia King, I received the following dispatch from the Supreme Criminal Tribunal at Pekin, relating to a case that had been tried in this province:

[*Supreme Court's Opinion.*] "A decision having taken place upon a case which we had laid before his Imperial Majesty for ratification, it is now fit and necessary that we should communicate the same to your excellency, as viceroy of Kwang-Tung and Kwang-See, to the end that the same may be duly carried into effect under your excellency's direction.

"His Majesty's Inner Council having, in the first instance, issued a transcript of the report of the viceroy of Kwang-Tung and Kwang-See, stating his investigation of the case of a foreigner, Edward Sheen, opening a window-shutter in an upper story, and dropping a stick so as to hit and occasion the death of Leao-a-teng, a native of this empire; His Majesty was pleased on the 8th of the 11th moon of the 12th year, to direct that our tribunal should revise the same and pronounce judgment thereon.—In obedience to orders, we accordingly, on the 10th day of the moon, took the said transcript into consideration; and we found that the viceroy's report

was grounded, in the first instance, on a report of the magistrate of Nan-hay-Sien, a district of Canton, which was to the following effect:

[*Magistrate's Report.*] "On the 18th day of the first moon of the present year, Leao-a-teng, a native of the district Pun-yu-Sien, went with his wife's brother Chao-a-Sse, to buy goods in a street within the said district, called She-san-hang, and happened to pass along the stone pavement under a warehouse called Fung-tay-hong. At the same time an Englishman named Edward Sheen, who was in the upper story of the said warehouse, in attempting to open the window, slipped his hand and dropped a stick, which, Leao-a-teng not expecting, could not avoid, and was therefore struck therewith on the left temple, so that he fell to the ground. Chao-a-Sse acquainted Leao-a-lun, the brother of Leao-a-teng, with the accident, who being thus informed of the particulars thereof, came and assisted the said Leao-a-teng to return to his home, and procured him medical assistance, which however had no effect, and the wounded man expired on the evening of the following day, the 19th of the moon. The brother of the deceased then reported the case to the head-man of the district; and by him, information was laid at the tribunal of Nan-hay-Sien, where the witnesses of the fact having been, in consequence, assembled and examined, the chief of the said [English] nation was called upon to deliver up the said criminal Edward Sheen, for examination and trial."

[*Supreme Court Opinion*, resumed.] "The viceroy proceeded to state, that repeated orders were, in consequence, issued to the Hong merchants on the subject, and through them to the chief of the said nation; in reply to which it was alleged, that the said criminal was sick of an ague and fever, and undergoing medical treatment for his recovery: at length, after repeated applications, it was reported that he had recovered from his sickness, whereupon the magistrates of the district confronted the criminal with the relations of the deceased, and having finished the investigation in

due form, referred the consideration of the proceedings to the chief judge, by whom the same process was renewed, and the result finally transmitted to the vice-regal office. His excellency having concluded the enquiry, by personally and strictly examining into the affair himself, ascertained that:

[*Viceroy's Report*, quoted.] "Edward Sheen is a native of England, engaged for hire to perform the duty of a seaman, on board the ship of Captain Buchanan, a merchant of the same nation. The said ship having been laden with a cargo of goods for trade, in the said kingdom of England, had arrived at the port of Canton and anchored in the reach of Whampoa, in the course of the 12th moon of the 11th year of Kia-King, after which the cargo was landed, and deposited in a warehouse or factory called Fung-tay-hong in the suburbs of the city of Canton. Edward Sheen had immediately thereupon accompanied Captain Buchanan and others to the upper story of the said warehouse or factory, in order to dwell therein, until, the returning cargo having been received, the period of departure should arrive. This upper story was also contiguous to and overlooked the street and path-way, towards which window was opened with moveable shutters. It happened also, that Leao-a-teng, a native of China, accompanied by his wife's brother Chao-a-Sse, went to the street called She-san-hong, to buy goods; and passing at the same moment under the said upper story, was struck and wounded by the end of the stick falling, as aforesaid, upon his left temple; and he thereupon fell to the ground. Chao-a-Sse acquainted Leao-a-lun, the brother of Leao-a-teng, with the accident, who, upon being informed thereof, immediately came and assisted Leao-a-teng to return to his home; and afterwards procured him medical assistance; all which, however, proved of no avail; and the wounded man died on the evening of the following day, the 19th of the moon. Now, the aforesaid criminal, Edward Sheen, having been repeatedly examined, has acknowledged the truth of all the facts here stated, without any reservation.— Con-

sequently, in this case, there is no appeal against the conviction of this offender, Edward Sheen; who, having been proved guilty of accidental homicide, may be sentenced to pay the usual fine, to redeem himself from the punishment of death by strangulation."

[*Supreme Court Opinion*, resumed.] "The foregoing being the substance of the report of the viceroy to his Imperial Majesty, we have deliberated thereon, and have ascertained that, according to the preliminary book of the penal code, all persons from foreign parts, committing offences, shall undergo trial and receive sentence according to the laws of the empire. Moreover, we find it declared in the same code, that any person, accidentally killing another, shall be allowed to redeem himself from punishment, by the payment of a fine. Lastly, we find, that in the 8th year of Kien-Lung [1743] it was ordered, in reply to the address of the viceroy of Canton then in office, that thenceforward, in all cases of offences by contrivance, design, or in affrays happening between foreigners and natives, whereby such foreigners are liable, according to law, to suffer death by being strangled or beheaded, the magistrate of the district shall receive the proofs and evidence thereof, at the period of the preliminary investigation, and after having fully and distinctly inquired into the reality of the circumstances, report the result to the viceroy and sub-viceroy, who are thereupon strictly to repeat and revise the investigation. If the determination of the inferior courts, upon the alleged facts, and upon the application of the laws, is found to have been just and accurate, the magistrate of the district shall lastly receive orders to proceed, in conjunction with the chief of the nation, to take the offender to execution, according to his sentence. In all other instances of offences committed under what the laws declare to be palliating circumstances, and which are therefore not capitally punishable, the offender shall be sent away to be punished by his countrymen in his own country.

"The case of the Englishman, Edward Sheen, opening a window-shutter in an upper story, and the wooden stick which supported it

slipping and falling down so as accidentally to hit Leao-a-teng, a native who was passing by, and by striking him to occasion his death, appears to be, in truth, one of those acts, of the consequences of which neither sight, hearing or reflection could have given a previous warning; there was therefore, no intention to injure, and the case is evidently agreeable to the construction stated in the commentary upon the law of accidental homicide. The said Edward Sheen ought therefore, conformably to the provisional sentence submitted by the viceroy to his Majesty, to be allowed to redeem himself from the punishment of death by strangulation [to which he would otherwise have been liable, by the law against homicide by blows], by the payment of a fine of 12 leang 4 sen and 2 lee [about 41£. 3s. sterling], to the relations of the deceased, to defray the expenses of burial: and then be dismissed to be dealt with in an orderly manner in his own country.

"We thus respectfully laid before his Imperial Majesty, our deliberate judgment upon this case, with the considerations whereupon it is founded, and humbly solicited a declaration of his Majesty's pleasure regarding the same.

"On the 17th day of the 10th moon of the 12th year [January 1808] the address was laid before his Majesty, and received his Majesty's answer in these words: 'We ratify your judgment.'

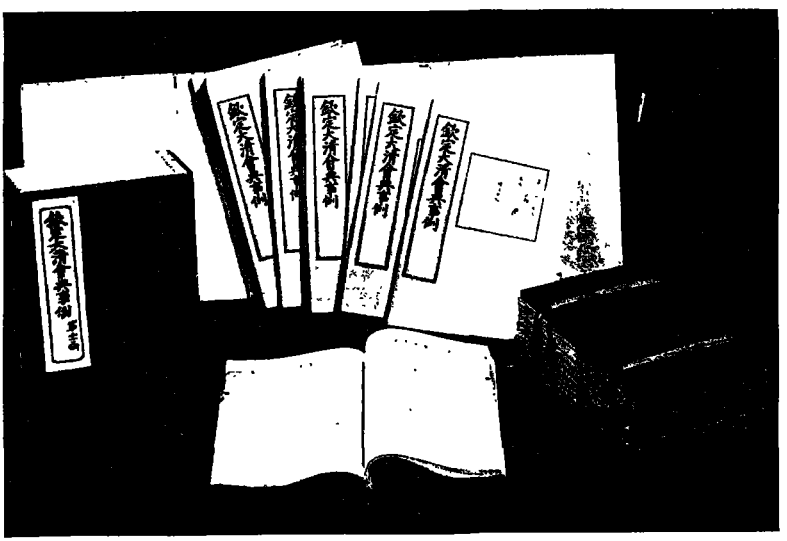
[*Viceroy's Letter*, resumed.] "The above communication of the Supreme Criminal Court, having reached the vice-regal office, I, in the first instance, directed the provincial judge to attend to the strict execution of the Imperial decree, by forthwith taking the said Edward Sheen and delivering him to the chief of his nation, in order to his being sent back to be governed in an orderly manner in his own country; the usual fine being at the same time duly recovered, for the re-imbursement of the relatives of the deceased for the expenses of his interment: the exact time of dismission of the said foreigner, and of the reimbursement of the said relatives, are to be duly ascertained and reported to me; but I think fit, moreover, to

communicate these things to your excellency, that you likewise may co-operate in attending to the due execution thereof."

[*Mayor's Letter*, resumed.] "His excellency the viceroy's communication having been transmitted to me, as Mayor, at my office, I determine to make it known to you also, Hong merchants, that you may, agreeably to these my orders, attend to the due execution of all things therein required. May you respectfully conform to these orders.

"The 7th of the 2d moon of the 13th year of the Emperor Kia-King [February, 1808]."

12. A Chinese law-book was usually printed in several paper-bound booklets,[13] and six or eight such



IV. 13—A Group of Law-Books
A law-book was usually printed in several paper-bound booklets, and six or eight were placed together between board covers tied with a clasp or cord

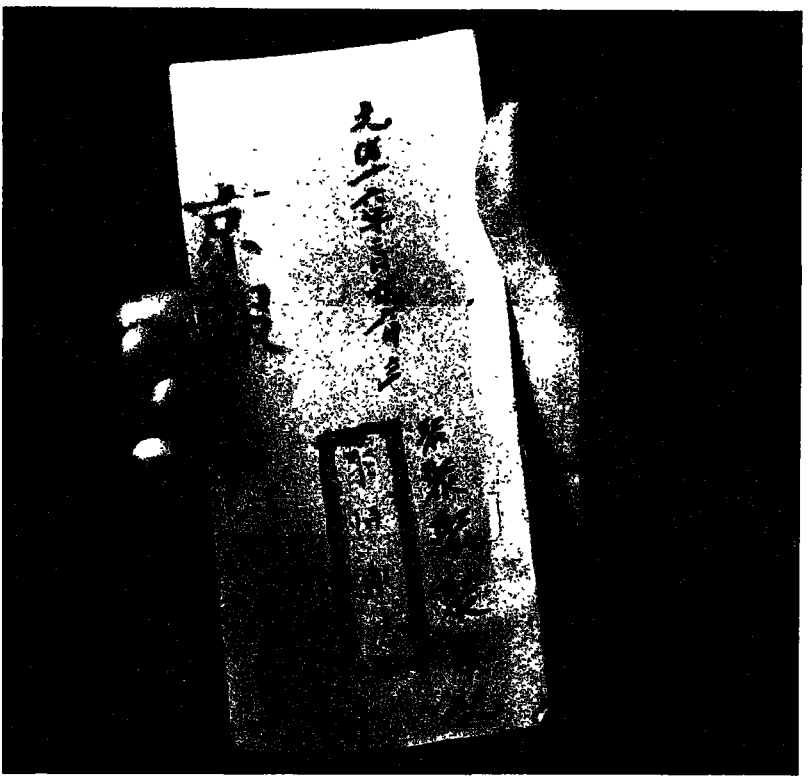
booklets were placed together in board covers tied with a clasp or cord. Numerous practice books were compiled, for the guidance of the trial judges; one of the most popular, called "Official Practice of the Ching Dynasty", or Ta Ching Hui Tien Tse Li, served as the magistrate's "vade mecum", much as Burn's Treatise on the Justice of the Peace used to serve in England two centuries ago.

The various decrees of the Emperor,[14] as they were issued, were published in small oblong separate leaflets, about eight inches long and three inches wide, under the name of Ching Pao, or Official Gazette, and these served somewhat like our session laws. In outward appearance, they are trivial; but the interior pages reveal how copious a pronouncement can be made in small compass in the concise Chinese language. The following decrees of the year 1905 will serve as samples of the scope and style:[15] The first is a judicial rescript (as used by the Roman emperors) replying to a request for instruction of law on a particular case (and the point is just such a one as might arise under our own law); the second is a legislative edict, instituting reforms in the prison system:

[*Rescript to a Magistrate on a Point of Law.*] Kwang Szi [emperor], 31st year, 5th month, 27th day. [1905]. "The governor of Kwangsi Province, Lee Yi Jing, herein petitions his majesty, the Emperor Kwang Szi, for further review of three murder cases: During the third month of the thirty-first year of the Emperor

12. Law-Books and Edicts

Kwang Szi [1905] three murder cases, namely Lao's case, Vao's case and Wong's case, were reported to the said governor for confirmation, from the Districts of Lon Shen, Yang Zo, and Shing An respectively. Lao and Vao had been duly tried and convicted of murder, therefore they ought to be hanged, according to the law.



IV. 14—OFFICIAL GAZETTE
It consisted of small oblong separate leaflets, not durable in material or binding

Wong also had been convicted of murder, but in this case the charge was more serious than the first two cases, because he feloniously killed his cousin, a person with his own family name. According to the precedents Wong should be punished by beheading, not hanging. But on the twentieth day of the third month, thirty-first year of Emperor Kwang Szi [1905], an edict was issued [subsequent to the date of Wong's offence], providing that thereafter all persons sentenced to capital punishment should be hanged instead of being beheaded. Wherefore the said governor proposes and prays that all three above convicted persons, Lao, Vao, and Wong, be hanged accordingly [the edict changing the punishment being thus made applicable to Wong's case]." "Approved: *Kwang-Szi.*"

[*Edict Reforming the Prison System.*] Kwang-Szi, 31st year, 9th month, 5th day [1905]. "A proposal for improving the prisons and for a method of raising funds to give effect to the new plan, made by the administrative department of the government, is herewith brought up to the Emperor Kwang Szi for review.

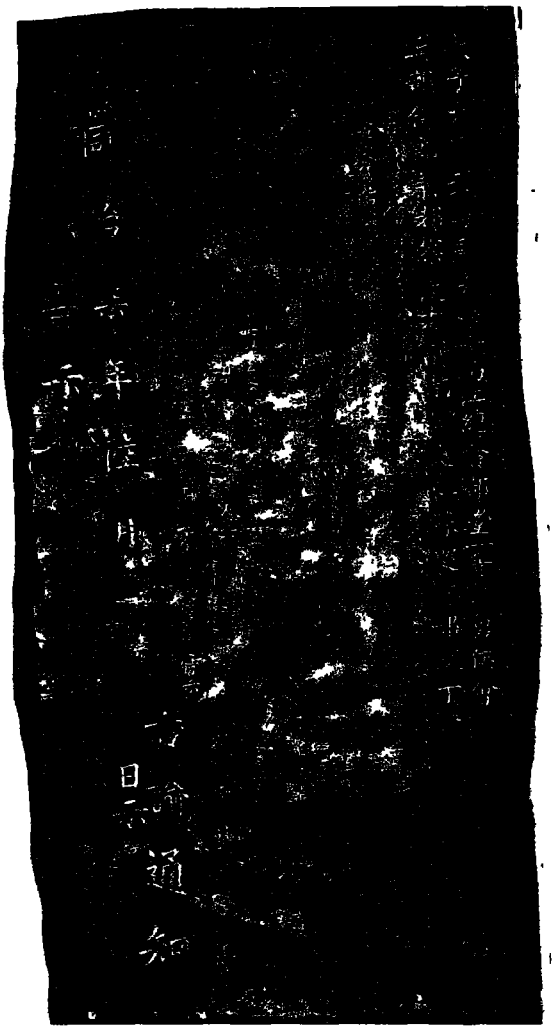
"According to the policy of western nations both of Europe and America with respect to the management of prisons, great care is taken not only as to the proper size of the rooms, and sufficiency of light and air, but also as to adequate provision of food for the prisoners. In short, hygiene is the first important thing which they take into consideration. This purpose is virtually identical with our ancient ideals. Unfortunately, however, at the present time, due to the gross negligence of those who have been entrusted with the duty, the rooms in the penitentiary are too small for the large numbers of prisoners and have insufficient light and air. Moreover, the food provided for prisoners is supplied with no regard for cleanliness or for nutrition. The prisoners have been treated no better than animals. It is indeed inhuman and infamous on the part of those by whose fault the prisoners have thus been suffering. Therefore, there must of necessity be a reform of these old prisons without delay. New prisons should be built on modern designs, with rooms

of suitable size, sufficiently supplied with light and air; and the victualing must be managed by definite regulations. The same improvements should also be adopted in the reformatories.

"Next, attention must be given to the ways and means of carrying out this new plan. It would be advisable for the provinces of Kiangsu, Kiangsi, and Anhui to experiment first and then to use their results as the model for the rest of the Provinces. As to funds, a new tax may be imposed for that purpose. Additional contributions may be secured by each province in its own way, as it sees fit. Prizes and rewards would be given to those citizens who would devote special zeal to the campaign for contributions. Further, great honor would be awarded to those magistrates who would put into operation the new plan with the greatest success. The period for executing this new plan may be limited to one year for prisons and two years for reformatories. The above measures are herewith submitted to the discretion of his majesty, the Emperor Kwang Szi". "Approved: *Kwang-Szi*".

Sometimes these decrees, for greater continuous publicity, were inscribed on stone, and set up near a temple or other public spot; and this practice continued into modern times. One has been found on a stone set up in 1860;[15] the law promulgated on this stone came into play in a lawsuit in which the writer's friend's father was interested, and reveals a social psychology peculiarly Chinese. It reads:°

"It is hereby forbidden to commit suicide for the sake of making another person liable for the homicide. By the Ching Code, no one shall be held responsible for the suicide of another person. Nevertheless, reckless persons are found who kill themselves with the purpose that their relatives may bring action against another person



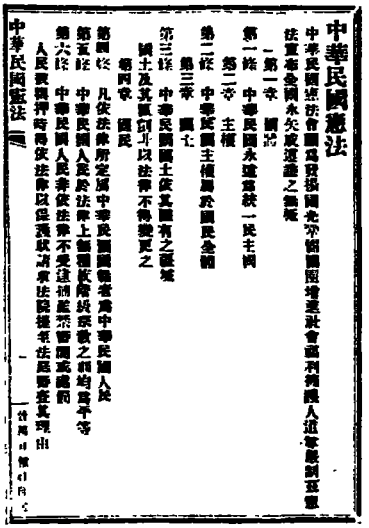
IV. 15—Stone Tablet with Decree of A. D. 1860
This facsimile was made from a rubbing of the original

for retribution and compensation; and the proceedings continue for months or even years. But no one shall be recognized to have a money interest in the death of a relative. All such actions shall hereafter be disposed of within one month, false and malicious suits shall be dismissed, and a money claim based on suicide is prohibited, on penalty of imprisonment not to exceed three years."

(III) The New Legal System

13. The Chinese are a unique race. They are the world's greatest pacifists; for, though their nation is the most numerous on earth, the Chinese themselves (except under one dynasty, two thousand years ago) have never gone out to seek by conquest a single acre outside of their native territory. Conversely, they have been patriotically exclusive, and have never willingly admitted strangers into that native land. And the reason, in both cases, is that they were entirely contented,—contented with themselves, with their ancestors, with their history, and with their place in the world. A Chinese governor said complacently to a friend of the present writer, less than twenty-five years ago, when the friend, an American explorer, showed him a modern world-map: "*Your* map is wrong. The world is flat; and China is the *centre* of *all* nations". Their own name for their country is Chum Kwe, or "the Central Nation"; or, sometimes, Tien Hia, meaning "all that is valuable upon earth".

But in 1912 came a constitutional upheaval, culmi-


中華民國憲法

中華民國憲法會議經國民大會依據國父遺教為鞏固國權增進社會福利保障人民基本權利確立民主政治之制度特制定本憲法頒行全國永矢咸遵

第一章 總綱

第一條 中華民國永遵循總理遺教以三民主義為建國之最高原則

第二條 中華民國主權屬於國民全體

第三章 國土

第三條 中華民國國土依其固有之疆域

國土及其區劃非以法律不得變更之

第四章 國民

第四條 凡依法律所定屬中華民國國籍者為中華民國人民

第五條 中華民國人民在法律上一律平等

第六條 中華民國人民身體非經法律不受逮捕審問或處罰

人民被拘押時得依法律以適當之理由

IV. 16—CONSTITUTION OF A. D. 1923

nating in 1923. Since 1850 the irritant influence of a half-century's contact with the democratic Occident, and the suffering under misgovernment of the Manchu foreign dynasty, had resulted in profound unrest among the educated classes. This came to an issue in 1906, and the Emperor was then compelled to promise immediate radical changes in China's constitution. Events moved rapidly, for China. In 1911 the Throne fell; and in 1912 came the Republic, and a provisional Constitution. In 1923 this was discarded, and a new Constitution was formally adopted.[16] Here are the first few articles:[p]

CONSTITUTION OF CHINA, OCTOBER 10, 1923

"CHAPTER I. FORM OF GOVERNMENT

"Art. 1. The Republic of China shall be a unified Republic forever.

"CHAPTER II. SOVEREIGNTY

"Art. 2. The sovereignty of the Republic of China is vested in the People.

13. *Laws of the Revolution*

* * * * * *

"CHAPTER IV. CITIZENSHIP

"Art. 5. Citizens of the Republic of China shall be equal, without distinction of race, class, or religion."

With the Constitution came a new formulation of law, in six compact codes, drafted on the European plan, by foreign-trained Chinese. The Supreme Court was reorganized. The building[17] that now forms the seat of supreme judicial authority bears a thoroughly Occidental appearance in architecture. The interior rooms are equally Occidental; American telephones, machine-made furniture, electric fans, and sheep-bound law books, now



IV. 17—SUPREME COURT BUILDING, 1922

form the environment in which this august tribunal deliberates.[18] The Chief Justice, in his correspondence abroad, uses a typewriting machine.[19] The Court's decisions, digested in English and French editions, cite the new codes, tolerate portions of the old ones, and use familiarly the Occidental catchwords about "juristic acts", "public policy", and the like. Their style is illustrated in the following cases,[q] two civil and one criminal; the civil cases should be compared with the older cases of a corresponding sort, quoted above:

[*Modern Supreme Court Opinions.*] [*Case 1.*] "In reply to *Szechuen Higher Court*, Tung 510, Oct. 3, 1916.



IV. 18—MAIN COURT-ROOM, 1922



IV. 19—Yu Chi-Chang, Chief Justice of the Supreme Court, 1925

"[*Syllabus.*] Matrimonial obligations cannot be enforced by specific performance.

"[*Facts.*] A's daughter C was engaged to D the son of B. Since his daughter was unwilling to marry, A subsequently revoked the said contract. B sued A for the breach and asked the court to render judgment for specific performance of the said contract. A pleaded that his daughter was unwilling to marry, and that she had shaven her head and made herself a nun in certain temple. C further declared that she would commit suicide if any one forced her to marry. The pending question in this case, therefore, was: Whether under such circumstances specific performance could be granted?

"[*Decision and Reasons.*] As a general rule, matrimonial agreements are obligatory to the parties to the contract. But there is neither rule nor precedent as to the specific performance of such obligation, whose nature is far different from other kinds of contract. According to the law of many other nations, such obligation is not to be performed by compulsion, for it is common sense that a forced marriage can scarcely do good to either party. The fine and imprisonment for the breach of marriage contract prescribed in the provisions of the Ching Code, as suggested by the plaintiff's counsel, no longer carry weight, since the enactment of the new Criminal Code. Moreover, so far as the nature of the present case is concerned, such penalty would here be inapplicable. The controversy in this case, however, can only be remedied by the compromise of the two parties, if possible, through the admonition of the local court."

[Case 2.] "In reply to the *Kiangsi Higher Court*, Tung 1401, September 16, 1916.

"[*Syllabus.*] Where the period of a mortgage of land does not exceed ten years, redemption may be asked for by the mortgagor, although it is expressly provided in the mortgage agreement that in

case of failure to redeem on the date fixed, the mortgagee acquires full title without making further payment.

"[*Facts.*] A mortgages his house to B, the agreement providing that the mortgage is to run for five years, at the end of which the redemption must be made, and that failure to redeem at the agreed time vests the title in the mortgagee without any further payment being made by the latter. The question is, whether eight years after the making of the mortgage agreement, A is still entitled to redeem.

"[*Decision and Reasons.*] A should be allowed to redeem. It is provided in the Regulations governing the Redemption of Mortgaged Property [quoted *ante*, page 167] that where the period of a mortgage does not exceed ten years, the mortgagor is allowed to redeem, notwithstanding a previous agreement that the right of redemption is cut off in case of failure to redeem at a fixed date."

[Case 3.] "In reply to the *Kwangsi Higher Court*, Tung 1080, Sept. 8, 1919.

"[*Syllabus.*] 1. To purchase good provisions for robbers or to sell rice to robbers constitute no offence.

"2. One who procures military information for robbers should be punished, according to the circumstances of the particular case.

"[*Facts.*] A, a woman, lived in the mountains. She often went to the city to procure military information for the robbers and to purchase food and provisions for them. She did not, however, actually participate in the act of robbing, nor did she share any robbed goods. Another person, B, lived beside the highway, a rice-dealer by trade. He often sold rice to the robbers when they passed by his store. He, too, neither participated in the robbery nor received any robbed goods. Apparently, A and B, either by procuring information for robbers or by furnishing them with food provisions, rendered material assistance to them, having knowledge that they were robbers. But there are no express provisions in the

Criminal Code, punishing such acts. Are A and B guilty of any crime?

"[*Decision.*] 1. A and B are not guilty of any crime, merely because they furnished food provisions to the robbers.

"2. A is guilty, if she is actually proved to have procured military information for the robbers.

"[*Reasons.*] As to purchase food provisions for robbers and to sell rice to the robbers are not directly connected with the crime of robbery, person doing such acts cannot be said to be guilty. So too for one who has served as cook to the robbers. (This point is covered by the decisions of the [new] Supreme Court Nos. 286 and 316). But to procure military information for robbers is otherwise, and is an offense for whose punishment provision is made in Supreme Court Decision No. 341. One guilty of this crime should be punished according to the particular circumstances of the case."

14. Whether these recent changes will supplant materially the principles and the spirit of the oldest and solidest legal system that the world has known, remains for the future to disclose. In contrast to the new Supreme Court Building, the curving gables[20] of the old palace of the Son of Heaven, the Emperor, may for the moment seem an anachronism. The peaceful gardens in which the most revered autocrat of the modern world once studied the Chinese classics, to learn the precepts of his ancestors, may now appear only to be relics of a discarded era. And the American bank-office style of interior fittings in the new Supreme Court's session-room is in strange disharmony with the old Imperial Throne-room,



IV. 20—An Angle of the Imperial Palace



IV 21 The Imperial Throne Room

where the political ideas of Confucius received continuous homage through more than two millenniums.[21]

The earliest traditions of a Chinese code far antedate King Harmhab, the great legislator of Egypt, whose portrait-statue we have here seen; yet the Egyptian legal system was long ago buried under the sands of the Nile Valley. The Caesars and the Senators of Rome once arrayed their wives and daughters in raiment of silk coming from the already civilized people of China; but the Roman Empire has long since vanished,—a mere episode in Time's chronicle. Yet the institutions of China, in spite of repeated dynastic convulsions and vicissitudes, still live, in a virile nation of four hundred million citizens.

IV. Chinese Legal System

Sources of Illustrations

1. *Map of China.* From the map in *Valentine Chirol*, "The Far Eastern Question" (London, Macmillan, 1896).
2. *Confucius and his Disciples.* From a reproduction of the mural painting by *John LaFarge*, "The Recording of Precedents", in the Capitol at St. Paul, Minnesota.
3. *Confucius.* From a colored wood-engraving, presented by Hon. *Ho Chi-Hong*, of the Ministry of Justice, Peking.
4. *Governor's Yamen.* From a photograph in *Francis H. Nichols*, "Through Hidden Shensi", p. 18 (New York, Scribner's, 1905).
5. *A Governor.* From a photograph in *F. H. Nichols* (cited *supra*).
6. *A Court.* From a photographic view in *John L. Stoddard*, "Lectures", vol. III, p. 325 (Boston, Balch Bros., 1901).
7. *Law Scripts.* From facsimiles in *Karl Faulmann*, "Geschichte der Schrift" (Leipzig, 1880).
8. *Kublai Khan.* From a facsimile in "Le Livre de Marco Polo", etc., ed. *M. G. Pauthier*, vol. II, p. 768, App. III (Paris, Didot, 1865).
9. *Ta Tsing Lu Li, title-page.* From the reproduction in *Staunton* (cited *infra*).
10. *Lu Li pages.* From the edition of 1907 (cited *infra*).
11. *Certificate of Land Title.* From the reproduction in *Hoang* (cited *infra*), p. 169.
12. *Supreme Court Decisions.* From the edition of 1866, edited by Pao Shu Yun.
13. *Group of Law-Books.* From a photograph of books in the Elbert H. Gary Law Library of Northwestern University.
14. *Gazette.* From a photograph of a collection in the Elbert H. Gary Law Library of Northwestern University.
15. *Stone Tablet with Decree of 1860.* From a rubbing obtained for the writer in 1925 by *George G. H. Ma*, Esq., of the Shanghai Bar; the original stone is in the city temple at Yangchow, and the rubbing was made by Mr. Ma Yu Po.
16. *Constitution of 1923.* From a copy in the Elbert H. Gary Law Library of Northwestern University.

17, 18. *Supreme Court Building.* From photographs presented to the author by Hon. *Yu Chi-Chang*, President of the Supreme Court.

Sources

19. *Chief Justice, 1925.* From a photograph of Hon. *Yu Chi-Chang*, presented to the author in 1926 by Hon. *Ho Chi-Hong*, of the Ministry of Justice, Peking.

20, 21. *Imperial Palace.* From the illustrations in *Burton Holmes*, "Travelogues", vol. IX, pp. 317 and 224 (Chicago, The Travelogue Bureau, 1914).

Sources of Documents Quoted in Text

a. Philosophy of Life. Translated from *Georges Padoux*, preface to *Leang Ki-tchao*, "La conception de la loi et les théories des légistes à la veille des Tsin", transl. Escarra and Germain (Peking, China Booksellers Ltd., 1926).

b. Analects of Confucius, book XII.

c. Philosophy of Justice. An unexcelled analysis of this principle of Chinese psychology will be found in an article by *Upton Close* (author of "The Revolt of Asia") in the "New York Times Magazine", April 17, 1927 (from which a sentence or two has been adopted). Some account of it, as applied in Japan, had been given in the present writer's "Materials for the Study of Private Law in Old Japan" (Asiatic Society of Japan, 1892, vol. XX, Supplement, part I, p. 71). That a similar principle must be taken into consideration with other Oriental races also is emphasized by *A. Mitchell Innes*, in his article on Oriental justice in the Hibbert Journal, XI, 273 (1896).

d. *Perera's Account.* From "Certain Reports of the Province of China by the Relation of *Galeotto Perera*" (reprinted in Hakluyt's "Principal Navigations, Voyages, etc.", MacLehose ed. 1904, vol. VI, pp. 300-309). Perera's arrest and trial are more fully related in Friar *Gaspar de Cruz*, "A Treatise of China", etc. (ed. in "Purchas his Pilgrims", vol. XI, p. 540).

dd. Magistrate's Keenness. From *Herbert A. Giles*, as quoted in Julian Hawthorne, ed. "Mystery and Detective Stories," vol. VI, p. 64 (New York, 1908).

e. Law of Adoption. From the translation in Staunton (cited *infra*), p. 84 (Div. III, Book I, Sect. LXXVIII).

f. Law of Mortgage. From the translation in Staunton, p. 101 (Div. III, Book I, Sect. XCV).

g. Li of 1799 and 1907, compared. From the translations (1) printed in Staunton, p. 529 (Appendix XV), and (2) MS. by *Y. Y. Wong*, Esq., of

Shanghai, from the edition of 1907 (year 1 of the Emperor Shi-Tong), vol. 9, pp. 16-20, edited by Ta-Tong Ka and Ta-Shia Yuen.

h. See the present writer's article on "The Pledge-Idea; a Study in Comparative Legal Ideas" (Harvard Law Rev. 1897, X, 321, 389, XI, 18).

i. Mortgage Deeds. From the French translations in *Hoang* (cited *infra*), pp. 122, 127.

j. Certificate of Title. From the French translation in *Pierre Hoang*, "Notions techniques sur la propriété en Chine", pp. 37, 169 (Shanghai, Mission Catholique, 1st ed. 1897, 2d ed. 1915).

k. Court Procedure. From *Gonzalez de Mendoza*, "The History of the Great and Mighty Kingdom of China", ed. Staunton, chap. X (Hakluyt Society's Publications, London, 1853, vol. XIV, p. 107).

l. Supreme Court Opinions. From the MS. translations, by *Y. Y. Wong*, Esq., of the Shanghai Bar, of cases in vol. VII, pp. 47 and 66, of Hsing An Hui Lao, edition of 1834 (year 14 of the Emperor Tao Kwang), printed by the house Tan Yue San Szu Tan.

m. Criminal Appeal. From the translation in *Staunton* (cited *infra*), p. 521, Appendix XI.

n. Ching Pao. From MS. translations, by *Y. Y. Wong*, Esq.

o. Stone Decree. From the MS. translation by *George G. H. Ma*, Esq., of Shanghai.

The psychology can be understood from the principles described in *Alabaster*, "Chinese Criminal Law" (cited *infra*), pp. 312-322; it is apparently analogous to the Hindu practice of "sitting dharna" as described by Sir Henry Maine (*post*, chap. V), and to the similar Keltic idea.

p. Constitution of 1923. From the translation in the "Chinese Social and Political Science Review", vol. VII, No. 4, p. 257.

q. Supreme Court Cases. From the translations in the "China Law Review", vol. II, p. 361 (April, 1926), vol. II, p. 323 (Jan. 1926), and vol. II, p. 155 (April, 1925).

General References

James Legge, "The Chinese Classics" (translated; various editions).

Sir *G. T. Staunton*, "Ta Tsing Leu Lee; being the Fundamental Laws", etc. (London, folio, 1810; a translation based on the editions of 1799 and 1805).

Sources

Père *Guy Boulais*, "Manuel du Code Chinois" (Shanghai, Mission Catholique, 2 vols., 1923-4: this work, a translation of the Tsing Code, covering more topics than Staunton's, and including reported cases throughout the 1800's, is now indispensable; the lamented author died in 1894).

Herbert A. Giles, "Historic China and Other Sketches", pp. 141-232, "Lan Lu-Chow's Criminal Cases" (London, 1882).

Pan Hui Lo, "A Study of Chinese Law and Equity" (Illinois Law Review, 1912, VI, 456, 518).

"Chinese Social and Political Science Review" (Peking, 1916+).

"China Law Review" (Shanghai, Comparative Law School of China, 1923+).

Ernest Alabaster, "Notes and Commentaries on Chinese Criminal Law" (London, Luzac & Co., 1899); "Notes on Chinese Law and Practice preceding Revision" (Shanghai, 1906); and *Challoner Alabaster*, various articles in the "China Review".

T. R. Jernigan, "China in Law and in Commerce" (New York, 1905).

P. Moellendorf, "Family Law of the Chinese" (Shanghai, 1879; German ed. 1895).

V. A. Riasanovsky, "The Modern Civil Law of China", part 1 (Harbin, Zaria, 1927).

E. H. Parker, "Comparative Chinese Family Law" (Hongkong, 1878); various articles in the "China Review"; "The Principles of Chinese Law and Equity" (Law Quarterly Review, 1906, XXII, 190).

Hu Shih, "Development of the Logical Method in Ancient China", chap. V (Shanghai, 1922).

H. P. Wilkinson, "The Family in Classical China" (London, Macmillan, 1926).

G. Jamieson, "Chinese Family and Commercial Law" (Shanghai, 1921).

E. J. Simcox, "Primitive Civilizations", vol. II, "Ownership in China" (London, Macmillan, 1894).

P. Hoang, "La propriété en Chine" (cited *supra*).

K. Asakawa, "The Early Institutional Life of Japan", chap. III, "Political doctrine of China" (Tokyo, Shuyeisha Co., 1903).

Leang Ki-Tchao, "La conception de la loi et les théories des légistes à la veille des Tsin", transl. Escarra and Germain, preface by Georges Padoux (Peking, China Booksellers Ltd., 1926).

P. L. F. Philastre, "Le Code Annamite" (Paris, Leroux, 2 vols., 2d ed., 1909).

Commission on Extra-Territoriality (Peking and Shanghai) and *Law Codification Commission* (Peking); various texts and digests of the new laws and decisions, since 1919, in English or French.



THE HINDU LEGAL SYSTEM

V

The Hindu Legal System

(*I*) *Races and Languages in India*

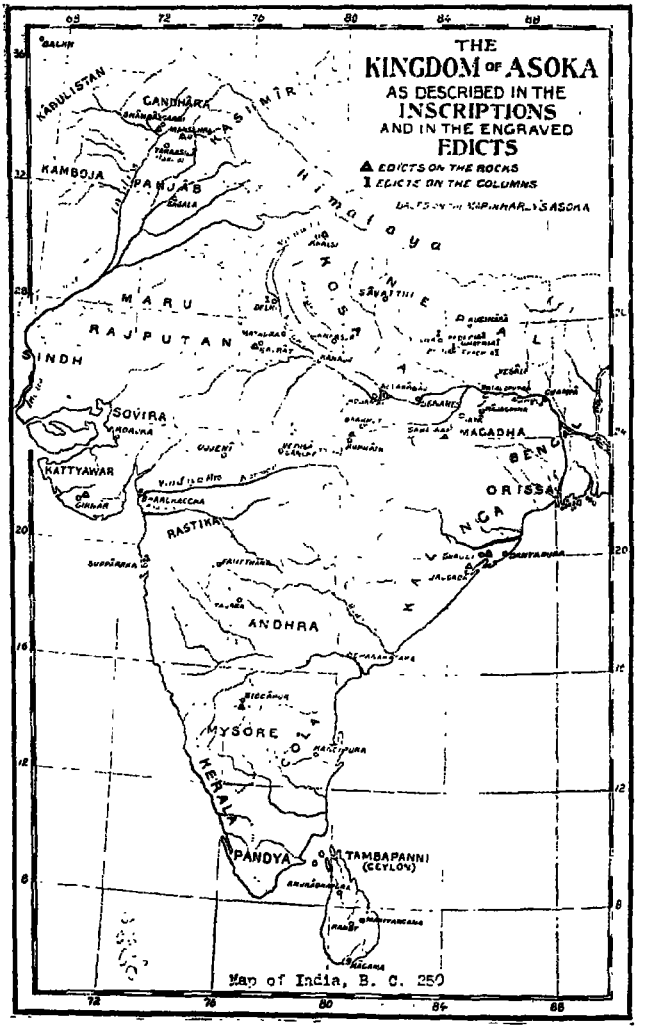
1. Heterogeneous peoples and law languages—Six successive alien dominations—Mohammedan element—Native Hindu law.
2. Sanskrit and Pali—Records on palm-leaf and stone—Deeds of B. C. 23 and A. D. 1000—Jagannatha's Rules for Conveyancing.

(*II*) *The Buddhist Branch*

3. Buddhist law—King Asoka's edicts.
4. Buddhist law in Indo-China, the East Indies and the Philippines.
5. Burmese law—Dhammathat—Court procedure.
6. Siamese law—A trial for treason in Siam.
7. Eradication of Buddhism in India.

(*III*) *The Brahman Branch*

8. Brahman Laws of Manu—Caste—Village justice—Schools of Brahman law—Jagannatha on the law of gifts.
9. Courts of the rajahs—The Durbar—Brahman legal advisers—Rules of pleading—Procedure by taboo.
10. Administration of justice—Bribery and perjury.
11. Brahman law submerged by the Mohammedan conquests—Revived under British rule.
12. Sanskrit discovered and the law books translated—Custom vs. scholastic books—Hindu law in British courts.



V. 1—MAP OF INDIA, B. C. 250

V

The Hindu Legal System

(I) Races and Languages in India

THE people of India number more than three hundred millions,—thrice the size of the population of the United States, but living in half the area.[1] Racially it is the most heterogeneous population anywhere on earth; it has been called "a great museum of races". It uses some twenty-five principal languages, with over three hundred dialects. A Chinese traveler reported sixty-four different alphabets, as long ago as the time of Christ. When a glossary of legal terms was compiled by an Englishman, for use in the courts, seventy-five years ago, he was compelled to employ nine different kinds of script, as shown in the tabulation prefixed to his book.[2] There are many distinct religious groups, the largest two of which are in perennial conflict; and their religion is often bound up with their law.

Naturally, no one system of law obtains, or ever did obtain; but a variety of local and racial institutions. Naturally, also, there has been no intrinsic political coherence. Even today there remain in India some seven hundred self-governing native states (apart from the area under direct vice-regal rule). The fact is, the peoples of India seem never to have been capable of self-determina-

V 2—Scripts of Principal Law Languages
An English glossary of law terms employed nine different kinds of script, to represent the principal languages used

tion as a political unit. Indeed, during the last 3000 years, India has been entered and dominated at least six successive times by immigrant alien races,—Indo-Aryans, Persians, Greeks, Turks, Mongols, English:

PERIODS OF IMMIGRANT RACES DOMINANT IN INDIA

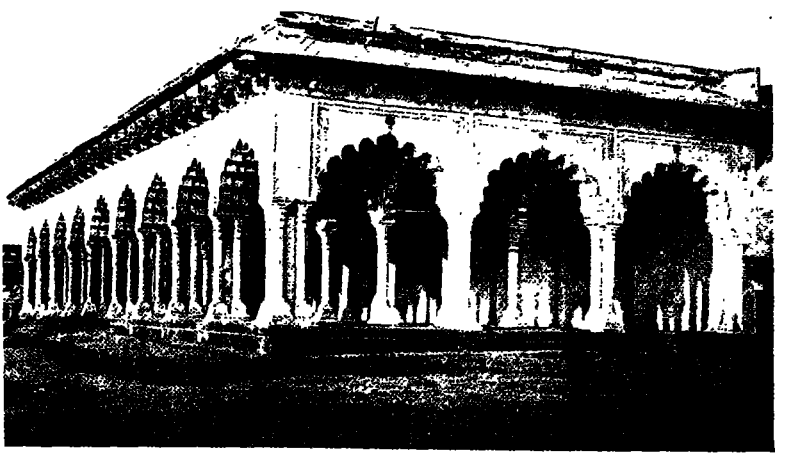
1. INDO-ARYANS	B. C. 2000+
2. PERSIANS	B. C. 500
3. GREEKS	B. C. 325
4. TURKS	A. D. 1000-1400
5. MONGOLS	A. D. 1400-1750
6. ENGLISH	A. D. 1750+

Of these races, the second and the third, the Persians and the Greeks, only took booty, and left no solid traces.

The fourth and the fifth races, the Turks and the Mongols, brought Mohammedan law, lived in jeweled magnificence, and developed in India the arts of architecture, sculpture, and painting,—the products of luxury and taste. The justice of these Mohammedan emperors was done in the Halls of Audience in their superb palaces; the Diwan-i-Am, or Audience Room, at Delhi is known as the "Westminster Hall" of Delhi.[3] The palaces of Delhi, Agra, and Fathpur, have been termed "dreams in marble, designed by Titans, and finished by jewelers". And the Mogul justice, of its kind, though corrupt in some periods and places, was efficiently dispensed under many of their

rulers. The Emperor Salim had a chain and bell attached to his own room in the palace, so that all who would appeal could reach him without running the gauntlet of the palace officials. Gibbon says, of the Emperor Timour, "Timour might boast that, at his accession to the throne, Asia was the prey of anarchy and rapine; whilst under his prosperous monarchy a child, fearless and unhurt, might carry a purse of gold from the east to the west."

But, of this dynasty, today only the palaces remain, as monuments to a vanished autocracy.[4] Their law is merely a branch of imported Mohammedan law (*post*, Chap. IX)



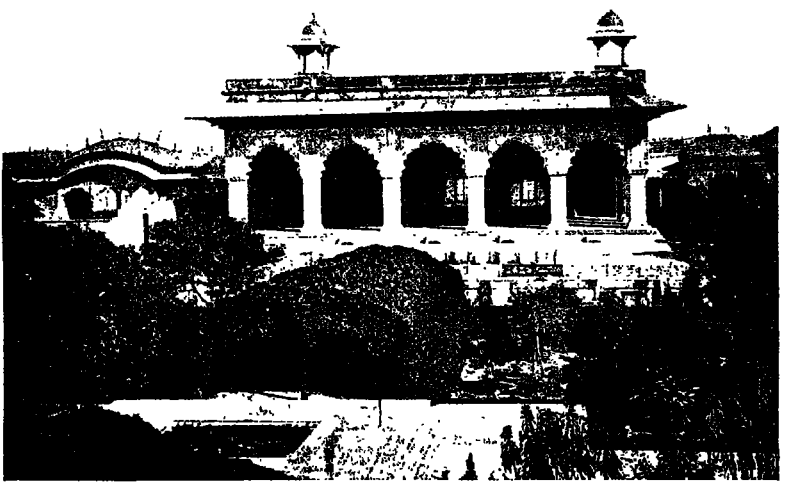
V. 3—AUDIENCE HALL AT DELHI

and is now in force only for their own believers—numbering, indeed, one-fifth of the present population of India.

The English race, the last to enter India, brought unity, liberty, and honest administration; but English law in India is mainly public law, preserving in private law the various native customs.

And so, of those six races of immigrants, the first, the Indo-Aryans, or Hindus, some 3000 years ago in origin, are the only race that developed a native system of law.

2. The records of this native system, in its two branches, the Brahman and the Buddhist, are contained



V. 4—HALL OF JUDGMENT AT AGRA

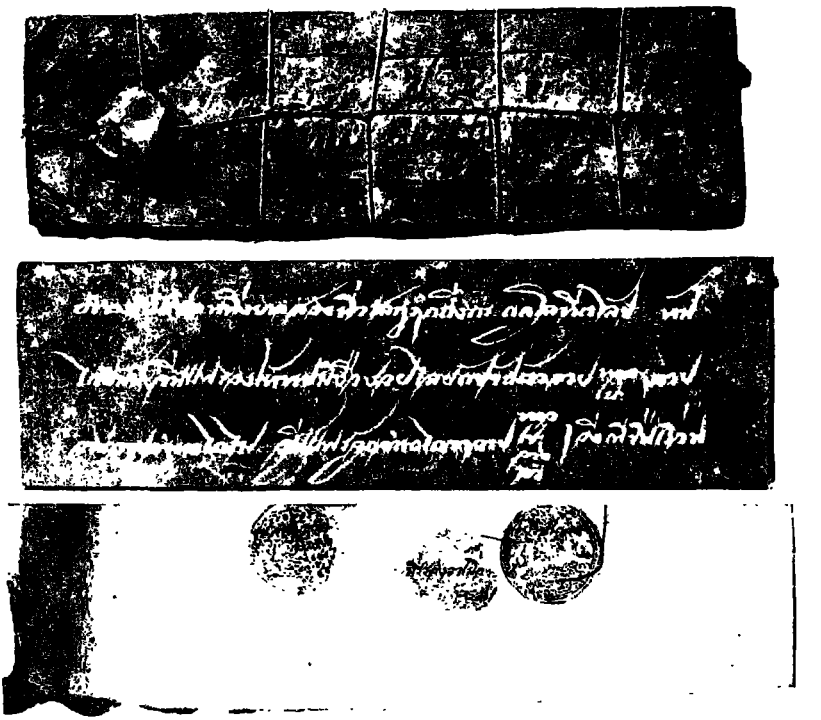
in the Sanskrit and the Pali groups of languages, respectively. The classical language, commonly known as Sanskrit, is to medieval Pali and to modern Hindustani very much what Latin is to the Romance languages of Europe.

The old books and records were commonly made of strips of birch-bark or palm-leaf, inscribed with a sharp stylus, and bound in wooden or silk covers. Throughout India and the East Indian islands the palm-leaf, the birch-bark, and the bamboo filled the place taken by the papyrus in Egypt. The writing-instrument was an iron or stone stylus, and the script impression was then sprinkled with black powder, or otherwise treated to make it clear. The strips, measuring a few inches by a foot or more, were then strung together through holes at each end, in accordion-style. Some of the surviving remnants of this literary material date back towards the beginning of the Christian era. After the arrival of paper, large sheets were used, and then folded in imitation of the ancient leaf-strips. As late as 1885 in Siam is found a court record,[5] inscribed with a white chalk pencil on black paper, sealed with a mud seal, and folded into these long narrow pages.

But many of the early edicts and formal records were inscribed on stone slabs or on copper or gold tablets. The earliest legal document extant in pure Sanskrit is a royal

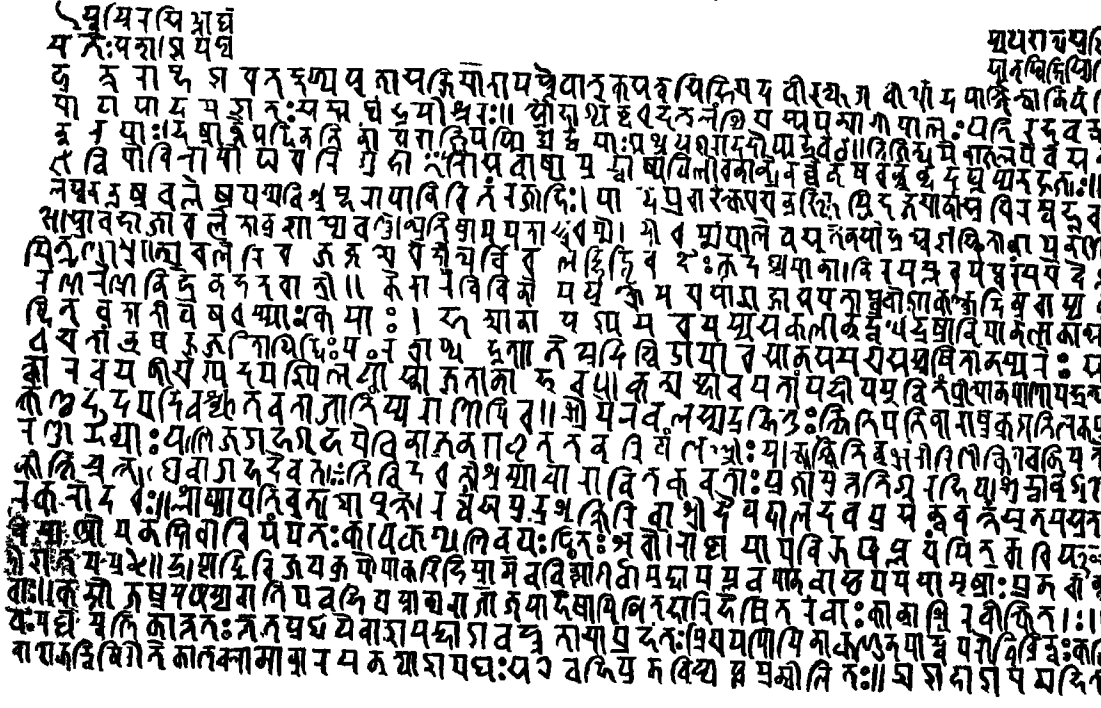
land-grant of B. C. 23, inscribed on copper.[6] Its phrases reveal the Indian variants of forms of conveyancing which will be appreciated by the modern lawyers:[a]

[*Oldest Sanskrit Deed, B. C. 23.*] "[After a preamble reciting the virtues and conquests of the grantor-prince,] To all the inhabitants



V. 5—SIAMESE COURT RECORD

The narrow oblong shape of the paper-leaf-folds is a relic of the earlier use of palm leaves strung together, accordion-style. At the top is shown the document's exterior, in the middle, a page of the opened document, below, the seal-stamps authenticating it.



of the town of Mesika . . . [naming other districts]; to the keeper of the elephants, horses and camels, to the keeper of the mares, colts, cows, buffaloes, sheep, and goats; to the different tribes [naming them], to all our other subjects not here mentioned; and to the inhabitants of the neighboring villages, ...

"Be it known that I have given the above-mentioned town of Mesika, whose limits include the fields where the cattle graze, above and below the surface, with all the lands belonging to it, together with the mango and modhoo trees, all its waters, and all their banks and verdure, all its rents and tolls, with all fines for crimes and rewards for catching thieves. In it there shall be no molestation, no passage for troops, nor shall any one take from it the smallest part. I give likewise everything that has been possessed by the servants of the Rajah. I give the Earth and Sky, as long as the Sun and Moon shall last. Except, however, such lands as have been given to God, and to the Brahmans, which they have long possessed and now enjoy. And that the glory of my father and mother, and my own fame, may be increased, I have caused this edict to be engraved, and granted unto the great Botho Bekorato Misro, who has acquired all the wisdom of books, and has studied the Vedas under Oslayono, who is descended from Opomonyobo, who is the son of the learned and immaculate Botho Borahorato, and whose grandfather was Botho Besworato, learned in the Vedas and expert in performing the sacrifice.

"Know all the aforesaid, that as bestowing is meritorious, so taking away deserves punishment; wherefore, leave it as I have granted it. Let all his neighbors, and those who till the land, be obedient to my commands. What you have formerly been accustomed to perform and pay, do it unto him in all things. Dated in the 33d year of the era and 21st day of the month of Margo.

"Thus speak the following stanzas from the book of Justice:

1. 'Ram hath required, from time to time, of all the Rajahs

that may reign, that the bridge of their beneficence be the same, and that they do continually repair it.

2. 'Lands have been granted by Sogor, and many other Rajahs, and the fame of their deeds devolves to their successors.

3. 'He who dispossesses any one of his property, which I myself, or others, have given, may he, becoming a worm, grow rotten in ordure with his forefathers!'"

It will be noted that the form of this deed illustrates the rule recorded centuries later by Yajnavalkya, one of the famous law-commentators, in these terms:

"Let a king, having given land, or assigned revenue, cause his gift to be written, for the information of good princes, who will succeed him, either on prepared cloth, or on a plate of copper, sealed above with his own signet; having described his ancestors and himself, the dimensions or quantity of the gift, with its metes and bounds, if it be land, and set his own hand to it, and specified the time, let him render his donation firm."

Another land-grant, about 1000 years later,[7] also on copper (the hole shows where a spike fastened it), employs equally technical phraseology, with local color peculiar to India:[b]

[*Sanskrit Deed, about A. D. 950.*] "The illustrious king Indrapala [reciting his titles and virtues] may he prosper!

"With reference to the land bearing four thousand measures of rice, and lying by the side of the land belonging to the Bhavisa of the hamlet of Kasi, situated within the district of Hapyoma, in the northern part of the country, he sends his greetings and commands to all who reside near the afore-said fields, viz., the accountants,



V. 7—LAND-GRANT (SANSKRIT) ABOUT A. D. 950
This deed is engraved on copper; the hole shows where a spike fastened it

traders and other common people of the district, as well as those who hold the rank of Raja, Rajni, Ranaka, and others, such as Rajanyas, Rajaputras and Rajavallabhas, and all who may hold any rank from time to time:

"Be it known to you, that this land, together with its houses, paddy-fields, dry land, water, cattle-pastures, refuse-lands, etc., of whatever kind it may be, inclusive of any place within its borders, and freed from all worries on account of the fastening of elephants, the fastening of boats, the searching for thieves, the inflicting of punishments, the tenant's taxes, the imposts for various causes, and the pasturing of animals such as elephants, horses, camels, cattle, and buffaloes, as set forth in this charter:

"To the Brahman Desapala . . . [reciting his lineage] who is austere and observes difficult ordinances, that land, as set forth in this charter, is given by me in the eighth year of my reign.

"Its boundaries are as follows: On the east, there are the Makkhi-path to the granary with the pond in front of it, and an embankment, also the Hasi of the Makkhi-path established by the still extant edict engraved on the Kuntavita pillar, and the ridge of the fields. On the south-east of the land, there are the hamlet of Kasi on the Kuntavita Lakkhyava property, and, along the boundary of the land, the big dike. On the south, along the boundary of the land, is the big dike. At the bend to the north and west, there are the big granary on the property of the Svalpadyati fishermen, and along the boundary of the land, the ridge of fields, also three clumps of bamboos. On the south-west, along the boundary of the land, there is the river Digumma. At the bend to the north, along the boundary of the land, there is the same river. At the bend to the east and the north, there are the granary belonging to the hamlet of Kasi, and, along the boundary of the land, the ridge of the fields. At the bend to the west, along the boundary of the land, there is a row of houses. On the west, there is the river Digumma. On the north-west, there is the same river. On the north, there are

the Bhavisa with the still existing charter of the holy Aditya [Sun-god] made by Tathagata, and, along the boundary of the land, a walnut tree on a dry spot on the ridge of the fields, on the south side of the tank made by Pacupati, as well as a ridge of fields. On the north-east of that land, there are the granary, with the Makkhi-path and the pond in front of it, as well as an embankment. [Then follows the seal, and an ascription to the king.]"

The form of deeds in use for ordinary grantors was thus described in one of the commentaries of the late 1700's, based on a text of a thousand years earlier:[c]

[*Jagannatha's Rules for Conveyancing.*] "'Land is conveyed by six formalities,—by the assent of townsmen, of kindred, of neighbours, and of heirs, and by the delivery of gold, and of water.'

"The form of the writing should be this: in place of the creditor's name, let the donee's be written, and the names of his father and so forth, to prevent a mistake of the person; next should be written, 'this deed of gift, as follows: for the sake of heaven I give unto thee, with gold and water, this land, measuring so much, and exceeding the necessary subsistence of my family, to be held for such a period.' If the townsmen and the rest be not witnesses to the deed, or if they be not present, the instrument should express, 'with the approbation of the king, and with the assent of sons,' and so forth. Though the consent of sons be not required in a gift for religious purposes, it should nevertheless be noticed (on account of the difficult publicity of a gift of immoveable property, which has been remarked by Sages) that himself and his descendants may not claim ownership. The year, month, fortnight, and day should be noted; and the donor should subscribe his name with his own hand, first writing the designation of his father and so forth. The names of witnesses, informed of the whole contents, may be subscribed by another hand, after asking their permission; but the writer's name

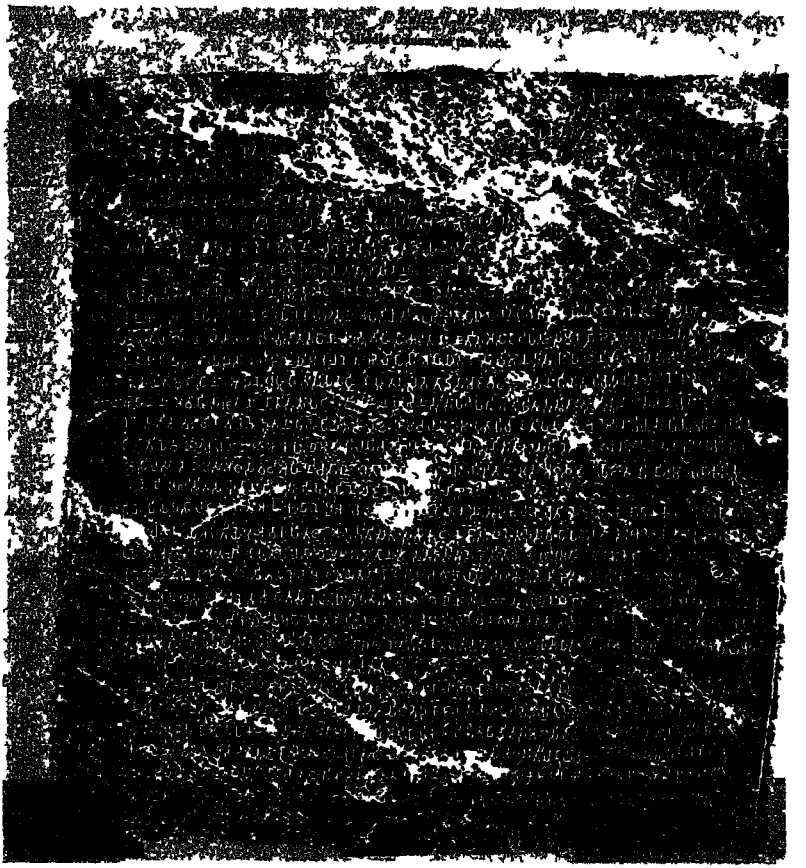
must be added. If any party be unable to write, the instrument should be subscribed by a substitute; but the donor, if unable to write, makes some mark, as a double line, or the like. Such is the practice."

(II) The Buddhist Branch

The Brahman branch of the Hindu legal system, though it finally came to dominate, was at first probably not more than the literary possession of the priestly class in the Aryan principalities.

3. Meanwhile, prior to the Christian era, the Buddhist branch had arisen and spread widely. Its active spread dates from about B. C. 250, propagated by the edicts of King Asoka,—often termed the Constantine of Buddhism. Asoka's grandfather, Chandragupta, king of Magadha, a region of the east, had extended his rule over all the north and west. This was shortly after the retreat of Alexander the Greek's invasion; and now, for the first time, in the history of India, there was a single authority from Afghanistan to Bengal, from the Himalayas to the center of the Dekkan,—the mightiest throne then existing in the world.

The grandson, Asoka, who came to the throne about B. C. 270, promulgated thirty or forty edicts, engraved on stone.[8] Asoka's edicts were composed in the Magadha script, a script older than Sanskrit; they represent the



V 8—KING ASOKA'S EDICT, B C 250
The Sixth Edict deals with the king's administration of justice "Complainants may report to me at any time, whether I am at dinner or in the harem or in my carriage or in my garden"

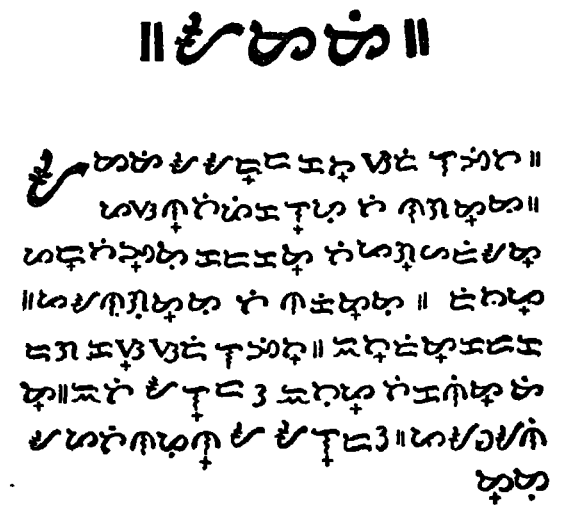
earliest extant law records of India. In Edict VI the King speaks thus on the administration of justice:[d]

[*King Asoka's Edict.*] "King Asoka, beloved of the gods, speaks thus: Complainants may report to me the concerns of the people at any time, whether I am at dinner or in the harem or in my carriage or in my garden and any dispute or fraud shall be brought forthwith to my notice. For I am never satisfied with my exertions in the despatch of business. There is no more important task for me than the welfare of all people: but the root of that is exertion in the despatch of business. And I strive to discharge the debt which I owe to the world This edict has been inscribed on stone, that it may endure forever."

Most of Asoka's edicts are short tracts, expounding and propagating his system of moral law, or "dhamma", founded on the preaching of Sakya (Buddha), some two centuries earlier. This term "dhamma" (like "maat" in Egyptian, "fas" in Latin, and "themis" in Greek) had a broad inclusive import; it meant "righteousness", "good form", "duty", and as Buddhism developed—the religion embodying Asoka's philosophy of life—the term "dhamma" came to include the meaning "Law". The new moral-religious system spread slowly over India. "Everywhere" said Asoka's thirteenth Edict, "men conform to the instructions of the king as regards the Dhamma; and even where the emissaries of the king go not, there, when they have heard of the king's Dhamma, the folk conform themselves, and will conform themselves, to the Dhamma precepts".

4. *Buddhist Law*

4. The new Buddhist system, carried in the Magadha script used by King Asoka, penetrated even beyond India, into Burma, Siam, Tibet, China, and the East Indian Islands. This Magadha script, indeed, was found as late as A. D. 1650 in the Philippine Islands, used for the Tagalog language.[9] For in southeastern Sumatra had arisen, about



V. 9—FILIPINO SCRIPT OF A. D. 1650
This script is founded on the Magadha script used by King Asoka B. C. 250

A. D. 700, the Buddhist colonial kingdom of Sri-Vishaya, whose domains finally extended to the Philippine Islands (where the tribal name "Visaya" still bears witness to its remnants). Later, about A. D. 1300, the kingdom of

Madjapahit, originating from a Brahman colony in Java, overthrew the Sri-Vishaya power, took control of the Philippines, and lasted for about two centuries. The Mohammedan invasion did not begin until this period. So that the basis of the Malayan civilization for several centuries was the Buddhist-Brahman religion and law. At the time of the Spanish discovery of the Philippine Islands, not only were the more advanced tribes using the Hindu syllabaries for writing; but also their mythology, folklore, politics, customary law, and general literature had a distinct Indian cast.

This Magadha script of King Asoka, in a more developed form known as Pali, had become the repository of the Buddhist laws of Burma, Ceylon, and Siam: and the laws of those countries came to represent a modified Brahman-Buddhist system.

5. In Burma, the Buddhist religion and law, carried by missionary monks, came into official dominance after about A. D. 1100. From that period, and during the next seven centuries, at intervals, is found a succession of law-books, first in Pali and later in Burmese, forming a continuous chain of systematic tradition in dogma, custom, and precedent.[10] The authors were sometimes Buddhist monks, sometimes royal ministers or judges; and the basis of all was Buddhism, in perhaps its purest surviving form;

ပြောဟူထားတို့အဘယ်ကိစ္စရှိ၍ရောက်သနည်း။ သုခမိန့်ဖြစ်သောသူ
ငယ်မေးလေသော်၊ ဆိုခဲ့ပြီးသမျှစကားအတိုင်းနှစ်ဘက်သားတို့အကုန်
ပြောကြလေသည်။ သုခမိန့်ဖြစ်သော သူငယ်ဆိုသည်ကား။ သင်
ပုထ္ထားလေးယောက်တို့၊သည်တွင်နေ။ တောသွားလေးယောက်တို့
အဝေးအရပ်လေးမျက်နှာမှာနေကြလေဆို၍ နေကြလေ၏၊ထိုမှတ
မျက်နှာသားကိုမေးသည်ကား။ ဤကမ္ဘာတည်စက၊မုသာဝါဒမဆို
သည်ဖြစ်၍ ဆင်းရဲ ခြင်းမရှိ။ သေသော်လည်း နတ်ရွာသို့ရောက်
သည်။ မဟုတ်သည်ကို ပြောဆို ချေက၊ ဤဘဝ၌ လည်းဆင်းရဲ
သည်။ ဘဝပြောင်းလည်း ငရဲမလွတ် ခံရချေသည်။ မှန်ရောပြောရ
မည်၊ မေးလျှင်၊ချေးချ၍ ပြေးသည်၊ လိုက်သည် မရပါဟု၊ ပြောဆို
သည်။အဘယ်အရပ်သို့ပြေးသနည်း ချေးအမွေးကား အဘယ်သို့
နည်း၊မေးသည်ကို၊အချေအရပ်သို့ ချေးပြုချ၍ ပြေးသည်ကိုဖြင်ပါ

\ 10—Dhammathat (Law Book) of Burma
Dhammathat was the generic name for the Buddhist law books of Burma, they date all the way between A D 1100 and 1800

yet the mythical sage Manu (specially sacred to Brahmanism) was claimed as the primal authority.

The usual generic name for these law-books was Dhammathat. The following passage[10] from a modern Dhammathat recounts the king's discovery of the wise judge, the ideal dispenser of justice in all primitive legend, —the Solomon who detects false witnesses; here he showed his shrewdness by requiring them to tell their stories separately, the very same expedient which made Daniel famous as a judge in exposing the conspiracy against Susanna:[e]

[*The Dhammathat of Burma—The Wise Judge Discovered.*] "In the country of Maha Thamada, four Bramins had by begging obtained one hundred tickals or pieces of silver money. They had not got four hundred, so they left the younger Bramin to watch the one hundred, and the three elder having gone off begging, four bee-hunters, who were going to the jungle, were consulted with by the younger Bramin, 'to divide the one hundred pieces of money equally amongst them, and when the elder Bramins return and demand it, I [the young Bramin] will say, A dog ran away with it; and do you bee-hunters say you saw it.' After they had thus consulted, the three elder Bramins returned. They said, 'We have now procured four hundred pieces of money. Do you keep the one hundred pieces left in your care; we will each take one hundred'. The young Bramin then said, 'My three friends, share your money with me. That left with me, being placed in one bundle in a cloth used for tying up meat and fish, a dog ran away with it, and it was lost. Though I followed with four bee-hunters, we could not recover it'. This the young Bramin said, and when they came to the head man of the town for his decision and stated the case as above, he ex-

amined the four men who were going to the jungle; they all said they also had followed the dog when he ran off. On the evidence of the witnesses he decided that the young Bramin had not secreted it, that it should be considered as lost, and the elder Bramins should share with the younger.

"The elder Bramins were not satisfied; but when they went to the ministers of the king, they gave the same decision; and when still dissatisfied, they went to the heir apparent; he gave the same. Still unsatisfied, they went to the first queen, who decided the same. They went to the king, and he also confirmed the decision. Yet still dissatisfied, they consulted with the young Bramin and the four bee-hunters, saying, 'Wherever we have gone for a decision of our cause, it has been given against us. In a certain village, a boy decides all cases, and if his decisions are correct, the Nats [deities] of the forest, the hills, the trees and the earth, men and birds, cheer and applaud; if they are not correct, they do not applaud. Have you also heard this?' The others replied, they also had heard it; and on this agreed that they would be satisfied with this young man's decision.

"Making a declaration to that effect, they went to him. They reached his place of abode in seven months, and enquiring for him at the house, were told he had gone out with his father to the plough. Following there, they saw him. Having left his father, he bathed and washed the mud off his feet and body. 'These Bramins who have come must have some dispute to decide'. Thinking thus, he put round him his father's cloak which happened fortunately to be at hand, and breaking a branch from a tree, spread it and set down under the shade. The little wise man then said to the Bramins, 'Oh! my friends, on what business have you come?' The two parties then told him the case as it had happened. The young wise man then said, 'My friends, you four Bramins remain here, and you four jungle-rangers go to a distance of four separate places', and they did so.

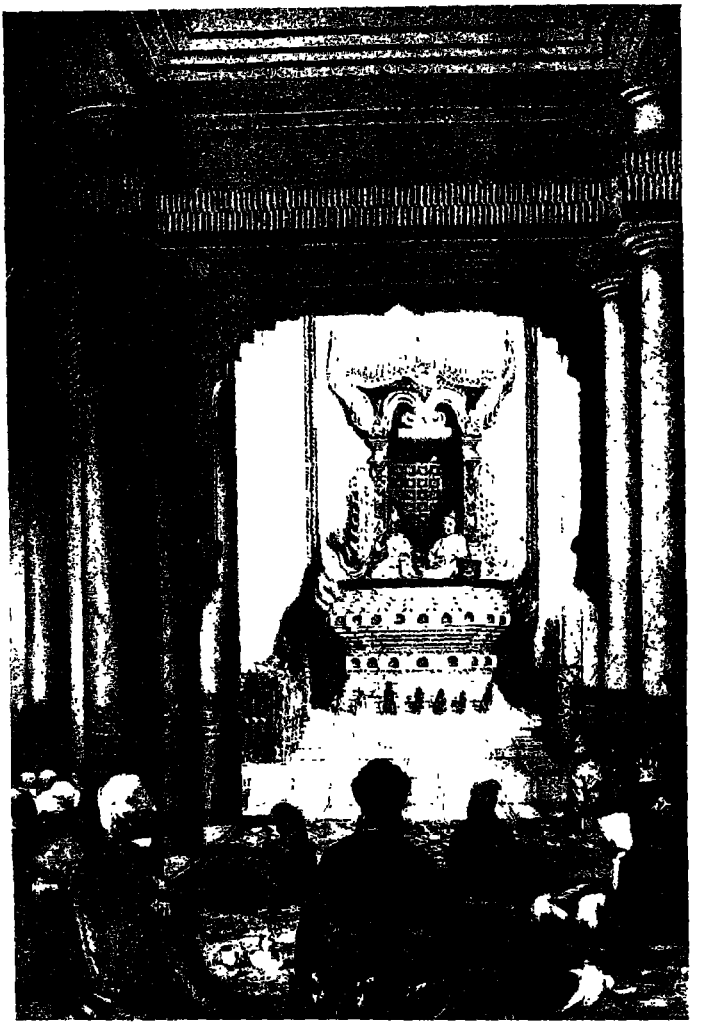
"He then examined one of the hunters, saying, 'At the commencement of this world, as there was no lying, there was no misery, and at death people went to the Nat country. When they began to speak falsely, there was misery in this life; but when they changed this state of being, they could not escape hell, but had to endure. Ye must speak the truth.' So on questioning him, he said they followed the dog on his running away, but could not catch him. The young man enquired in what direction the dog had run, and what was his color. The witness replied, he saw a white dog, and he ran east. On questioning another in the same way, he replied a red dog had run south. And on questioning another, he said a black dog had run west, and the fourth said a spotted dog had run north. Before examining the four, he had explained to them good and evil, and made them declare that they would speak the truth. He now said, 'they have conspired to cheat, and concealed the money; let them be taken to the king of the country.' As they were afraid to go before the king, and the money they had taken was still by them, he caused them to dig it up from where it was hid and return the full amount

"When the Bramins represented to the king that their case had been decided, he enquired by whom the decision had been given, and saying, he certainly is a man of unparalleled wisdom, he sent for the young man and appointed him minister. When the king appointed him to try all the causes he said: 'O king! I am afraid to undertake the decision of all the cases in the country No man is free from mistakes. I am not equal to the task.' So he begged to be excused. The king, having fixed a certain term in years and months, begged him to undertake it. So making his obeisance to the king he agreed to enter the law-shed and decide causes for seven days, and requested to be allowed to consider the old and true road of former decisions. So he was permitted to consider."

Burma appears in history as a kingdom united more

than once under a single autocratic ruler, with the capital at Pegu (or Ava). Travelers were always impressed with the superb royal display at Pegu,—the long moat full of crocodiles, the watch-towers, the gorgeous palace, the great processions of elephants, the shrines of gold and gems, the vast array of armed men, and the king himself on his throne. The king's audience of justice[11] is thus described by a Venetian merchant in A. D. 1569:[f]

"He sitteth up aloft in a great hall, on a tribunal seat, and lower under him sit all his barons round about. Then those that demand audience enter into a great court before the king, and there set them down on the ground forty paces distant from the king's person, and amongst those people there is no difference in matter of audience before the king, but all alike. And there they sit with their supplications in their hands, which are made of long leaves of a tree and with their supplications, they have in their hands a present or gift, according to the weightiness of their matter. Then come the secretaries down to read these supplications, taking them and reading them before the king. And if the king think it good to do them that favour or justice that they demand, then he commandeth to take the presents out of their hands; but if he think their demand be not just or according to right, he commandeth them away without taking of their gifts or presents."



V. 11—AUDIENCE AT THE COURT OF BURMA

5. *Burmese Law and Justice*

But the Burmese king's justice was not always personal. Since the 1200's—the period of one of the earliest law-books—a Supreme Court (for both judicial and executive business) had been developing; it was known as the "Hluttaw Yon". A senior prince presided, when the king did not attend; and it is recorded that though he might capriciously dismiss the judges, he rarely repudiated their decisions. The procedure of this court in the early 1700's is described by an observant English trading captain, Hamilton, who spent more than thirty years in the East Indies:[8]

[*The Supreme Court, in Burma.*] "The south gate of the palace is called the Gate of Justice, where all people that bring petitions, accusations, or complaints, enter All cities and towns under this king's dominions are like aristocratical commonwealths. The prince or governor seldom sits in council, but appoints his deputy, and twelve councillors or judges, and they sit once in ten days at least, but oftener when business calls them. They convene in a large hall, mounted about three feet high, and double benches round the floor for people to sit or kneel on, and to hear the free debates of council. The hall being built on pillars of wood, is open on all sides, and the judges sit in the middle on mats, and sitting in a ring there is no place of precedence. There are no advocates to plead at the bar, but every one has the privilege to plead his own cause, or send it in writing to be read publicly, and it is determined judicially within the term of three sittings of council; but if any one questions his own eloquence, or knowledge of the laws of equity, he may empower a friend to plead for him; but there are no fees but what the town contributes for the maintenance of that court, which, in their language, is called the Rounday, and

those contributions are very small. There are clerks set at the backs of the judges, ready to write down whatever the complainant and defendant has to say. And the case is determined by the prince and that council, very equitably; for if the least partiality is found awarded to either party, and the king is made acquainted with it by the deputies at court, the whole sentence is revoked, and the whole board are corrected for it, so that very few have occasion to appeal to court, which they may do if they are aggrieved; and if an appeal is made upon ill grounds, the appellant is chastised, which just rigour hinders many tedious suits that arise where there are no penalties annexed to such faults."

6. In Siam, the same Buddhistic-Brahman religious-moral system obtained. It was a diluted and composite system; for in the course of history, first, some Indian invaders, in the early Christian era, had overrun the Indo-Chinese peninsula and imposed Brahmanism; and then the Buddhists, expelled from India, about A. D. 1000, immigrated and planted their rival form of religion and law during the next three centuries. The result was composite; the books of the Brahman law dealing with religion, caste, and administration were rejected, but the books dealing with civil and criminal law were preserved, sometimes textually. In the northeast, in Annam, Chinese ideas dominated. The whole peninsula was in fact a border-line region, where native institutions mingled in variant degrees with a superstructure ranging from Brahman-Buddhist ideas on the west to Chinese ideas on the east.

6. *Siamese Law and Justice*

Each of these Indo-Chinese kingdoms—Siam, Cambodia, Annam—developed its administration of justice in its own individual fashion. In Siam, for example, a strange multiplicity of jurisdictions grew up. The region outside of Bangkok, the capital, was divided into three departments, each with its independent hierarchy of courts. Within the department a case went to four courts, each independent of the other; the first one could sanction the complaint; the second investigated the facts; the third passed upon the defendant's culpability; and the fourth imposed the sentence. This system, odd as it seems, nevertheless reveals a high degree of organization.

A realistic glimpse of the trial-methods in Siam in the early 1700's is given us by Captain Hamilton (above quoted), who was himself brought to trial there on a capital charge.[12] Hamilton, relying on an earlier treaty between England and Siam, had gone to that country to trade, but was not permitted to do so, owing to the intrigues of a crafty Persian agent of the English governor at a Burmese port, revoking the treaty. Hamilton's conversations with the Persian, protesting against this treatment, brought him into trouble, as he thus relates:[h]

[*A Trial for Treason, in Siam.*] "This Persian (whose name was Oia Sennerat) and I were discoursing one day of my affairs in the Industan language, which is the established language spoken in the Mogul's large dominions, and, among other things, I was laying

down to him the difficulties that might attend the King of Siam's trade, carried on from Merjee to Fort St. George, because if the rest of the English colonies were forbid trading with Siam, they had just



V. 12—Old and New Justice Buildings in Siam
Above is a view of the king's audience-hall in older days; below, the modern Ministry of Justice

cause to forbid his subjects to trade to Fort St. George, or anywhere else, and that other troubles might arise to the king's affairs, *by thus imposing on the king*, who was ignorant of the consequences that might follow in breaking the agreement made in England without so much as once giving warning to the English colonies of other parts of India.

"About a week after, I had a summons to appear before a tribunal, to answer to an indictment of speaking treason of the king. I knew myself innocent, and appeared at the time appointed, which was about eight in the morning. The court was held in a large, square, oblong hall, open on all sides. About nine the judge came with some thousands of attendants, and, as he passed by me to take his place, he viewed me very narrowly, as I did him with much attention. He was a man of a middle stature, about 50 years of age, of a pleasant but grave countenance, and had a quick sparkling eye. He spoke to my interpreter, to bid me have a care of my tongue, lest I should prejudice myself in answering to intricate questions. I thanked him for his admonition, and told him, 'A word to the wise was sufficient'.

"Having placed himself, he ordered my indictment to be read, which was accordingly done, and in about half an hour's time it was ended. He asked me by my interpreter, if I understood what was libelled against me. I answered, 'No'. He then bade the interpreter inform me of the meaning of each particular paragraph, as they were read a second time with deliberation, and, having heard my impeachment, which was grounded only on my saying, 'That *the king had been imposed upon*', I thought fit to deny all, and put my adversary Oia Sennerat to prove that I had said so; but, by the bye, I found, that saying the King of Siam was capable of being imposed on, is rank treason.

"The judge chose out of the assembly two procurators for each of us; and there were no small debates, for three or four hours, 'Whether or not a stranger, who was ignorant of the laws of Siam, could come under the penalty annexed to the transgression of their laws, when they were broken through ignorance, and not with design;' but my antagonist at last carried it in the affirmative, though the judge seemed to incline towards the opinions of my advocates.

"Then the judge put Oia Sennerat to prove what I was accused of, and he produced two of his own servants, who stood at some distance when we were discoursing of my affairs; but my advocates challenged the laws of Siam for their insufficiency, for that law admits not of a servant's testimony, either for or against his master. Then he proffered to bring an undeniable witness against me, who was the only person with us when we discoursed, and that was Collison, who was presently sent for, and being set by my adversary, the judge asked him by the interpreter, if he was present at such a time, when Oia Sennerat and I were in warm discourse. He answered, he was. He then interrogated him, if he had heard me say in my discourse, that the king had been imposed on. He affirmed he had; on which I perceived a cloud overspread the judge's countenance, and many others who had come to hear the trial seemed sorrowful.

"After a little pause, the judge, by the interpreter, asked me what I had to say to Collison's evidence. I answered, that I had little knowledge of him, but that he might be an honest man, or otherwise, as his interest led him. All continued mute for a little space, and I broke the silence by desiring the judge to ask Collison in what language I held that discourse with Oia Sennerat, which the judge did, and was answered, that he did not well know, but that he believed it was in the Industan language. I begged the judge to ask him if he understood that language, and he did so. Collison, after

some pause, answered, 'No'. Then the judge asked him angrily, and with an air of disdain, how he could come in as evidence of words spoken in a language that he did not understand, and he simply said, that he thought I had said so; at which the whole crowd gave an huzza, and clapped their hands, and seemed joyful. The judge reprimanded Oia Sennerat for putting him and the court to so much trouble, and complimented me on my safe delivery, and so departed seemingly well satisfied.

". When the judge came, some executioners had followed him with their instruments of death, to put the sentence in execution as soon as the judge pronounces it. Our debates held so long, that it was near eight at night before we got home. Had I been cast in my process, my head had been a sacrifice to my adversary's resentment, and my ship and cargo to the much-injured



V. 13—SIAMESE MODERN SUPREME COURT, ABOUT 1920
The three Occidentals, Messrs. James, Noel and Guyon, were the foreign legal advisers

king, and, to sum up all, my ship's company had been the king's slaves. On my returning home victorious, I had the congratulations of all my friends, particularly the Chinese merchants, whose lives and estates might have been endangered by the like villainous informations."

Siam has in modern times (about A. D. 1900) reorganized its legal system on Romanesque models;[13] but historically it formed a bye-product of the Buddhist-Brahman system of India. That such a reorganization need not mean an abandonment of historic legal ideas may be seen from the following semi-official comment:[i]

"The ancient laws of Siam are fortunately worded in very wide terms, and are elastic enough, with the exercise of a little ingenuity, to meet nearly all the requirements of modern conditions in this country. The importation of brand-new codes would doubtless make the work of the judges easier; but the advantages of working on a system known to the people for centuries are obvious. As substantial justice can always be meted out if the judges display ordinary intelligence and impartiality, the changes of the future are likely to be confined to the gradual amendment of the present ground-work."

7. But meanwhile, in India, between A. D. 400 and 700, a complete social and religious reaction took place. Buddhism was eradicated,—as some say, by Brahmanistic persecution; but the true cause is not yet agreed upon by scholars. At any rate, though Buddhism has spread over the entire east coast of Asia, it has virtually disappeared from India, its original home. After A. D. 800 in India, Brahmanism prevailed for all Hindus.

(III) THE BRAHMAN BRANCH

8. The typical law-book of the Brahman-Hindu system is the famous Laws of Manu,[14] ascribed by tradition to Manu, the primitive author of this system, a pre-historic deity. This system was copiously cultivated, for twenty centuries, by the continuous speculations of

व्यवहारान्दिदृक्षुस्तु ब्राह्मणैः सह पार्थिवः।
मन्त्रज्ञैर्मन्त्रिभिश्चैव विनीतः प्रविशेत्सभाम् ॥ १ ॥
तत्रासीनः स्थितो वापि पाणिमुद्यम्य दक्षिणम्।
विनीतवेषाभरणः पश्येत्कार्याणि कार्यिणाम् ॥ २ ॥
प्रत्यहं देशदृष्टैश्च शास्त्रदृष्टैश्च हेतुभिः।
अष्टादशसु मार्गेषु निबद्धानि पृथक्पृथक् ॥ ३ ॥
तेषामाद्यमृणादानं निक्षेपोऽस्वामिविक्रयः।
संभूय च समुत्थानं दत्तस्यानपकर्म च ॥ ४ ॥
वेतनस्यैव चादानं संविदश्च व्यतिक्रमः।

V. 14—LAWS OF MANU (SANSKRIT)

several hundred priestly jurists, who produced thousands of volumes on law.

Perhaps the most marked peculiarity of this system was the Brahman-Hindu rules of caste. Even today are found more than eighteen hundred castes and sub-castes; there are fifty million people who are untouchable by other individuals. The law-book of Manu is founded on the principles of caste.[j]

[*Laws of Manu, Chap. I.*] "Par. 31. The Lord created, from His mouth, arms, thighs, and feet, the Brahman (holy man), Kshatriya (warrior), Vaisya (working-man), and Sudra (menial).

"Par. 87. Now, for the sake of preserving all this created world, the Lord ordained separate duties for those who sprang from His mouth, arms, thighs, and feet

"Par. 93. The Brahman, since he sprang from the most excellent part, since he was the first-born, and since he holds the Vedas, is by right the lord of all this creation

"Par. 100. Thus, whatever exists in the universe is all the property of the Brahman; for the Brahman is entitled to all by his superiority of birth."

This rigid law of castes exalted the priesthood, subordinated the artisan and the peasant, and enforced class-distinctions in an inhuman degree never elsewhere known in any of the world's legal systems.

The village communities, indeed, of the various tribes of India, by long tradition, were left largely to their own self-government; they had their own local judges, who

interpreted their local customs, and these customs were the only law, in a large part of their daily life. We can re-construct these ancient village courts,[15] in imagination, from the surviving ones in the remote mountain districts, as an observant modern traveler has depicted them:[k]

"[*A Village Court.*] Colonel Erskine, the Commissioner for the Kumaon district, invited me to accompany him on his own official tour It was a perfect education traveling with Colonel Erskine, for that shrewd and kindly old Scotsman had spent half his life in India, and knew the Oriental inside out On arriving in a village he would call for a carpet, and a dirty cotton dhuree would be laid on the ground. He would then order a charpoy, or native bed, to be placed on the carpet, and he would seat himself on it, and call out in the vernacular, 'Now, my children, what have you to tell me?' All this was strictly in accordance with immemorial Eastern custom. Then the long line of suppliants would approach, each one with a present of an orange, or a bunch of rhododendron flowers in his hand. This, again, from the very beginning of things has been the custom in the East Colonel Erskine was a great stickler for these presents; and as they could be picked off the nearest rhododendron bush, they cost the donor nothing.

"The outpouring of grievance and complaints then began, each applicant always ending with the two-thousand-year-old cry of India, 'Dohai, Huzoor!' ('Justice, my lord!'). The old Commissioner meanwhile listened intently, dictating copious notes to his Brahmin clerk, and at the conclusion of the audience he would cry, 'Go, my children, Justice shall be done to all of you,' and we moved on to another village. It was very pleasant seeing the patriarchal



V. 15—Village Trial Scene

relations between the Commissioner and the villagers. He understood them and their customs thoroughly; they trusted him and loved him as their official father. (The Brahmin clerk was a very intelligent man, and spoke English admirably, but I took a great dislike to him, noting the abject way in which the natives fawned on him. Colonel Erskine had to discharge him soon afterwards, as he found that he had been exploiting the villagers mercilessly for years, taking bribes right and left.)"

The Brahman jurists, nevertheless, wove local custom, to a large extent, into their law-books; and hence, since the customs varied widely in different parts of India, there grew up four or five distinct sects, or schools, of Hindu legal thought, each covering the whole field of the law, but having special vogue in a different part of India (much as the Mohammedan law developed distinct schools in the widely distant regions of the Mohammedan world). But all of them based their speculations on the great original mythical law-teacher Manu, whose divine authority they recognized.

These jurists commented on the traditional texts of Manu and other early formulators of the law, and debated the views of other commentators, just as the Jewish rabbis developed their law by comparison of case-comments (*ante*, Chap. III). When the English came to govern India, they followed the earlier example of the Hindu princes and caused digests to be compiled from these various commentaries and schools. One of the best

known, compiled at the suggestion of Sir William Jones, was that of Jagannatha. (This eminent pundit in 1815 was still living, at the age of 108 years, surrounded by four generations of his descendants, numbering nearly a hundred, and lecturing daily to his pupils on law and philosophy.)

The method of his digest is illustrated in the following passage,[1] on a topic which comes into play in the English decision quoted later (the first three paragraphs are from the old texts):

[*Jagannatha's Digest, on Capacity to Convey.*] "NARADA. What has been given by men agitated with fear, anger, lust, grief, or the pain of an incurable disease; or for a bribe, or in jest, or by mistake, or through any fraudulent practice, must be considered as ungiven. So must anything given by a minor, an idiot, a slave, or other person not his own master, a diseased man, one insane or intoxicated, or in consideration of work unperformed.

"MANU. 'Three persons, a wife, a son, and a slave, are declared by law to have in general no wealth exclusively their own; the wealth which they may earn is regularly acquired for the man to whom they belong.'

"VYASA. 'But, at a time of distress, for the support of his household, and particularly for the performance of religious duties, even a single coparcener may give, mortgage, or sell the immovable estate. . . .

[*Comment.*] "'A person not his own master;' a son, slave, or the like: so Vachespati-misra, Chandeswara, Bhavadeva and Vachespati-Bhattacharya.

"Here some remark that Misra and the rest have not explained the term as denoting one who is not owner, but have explained it

'son, slave, or the like'; by which it is denoted that their meaning is this: a gift made by a person technically denominated not his own master is void. Persons so denominated are described by Narada, as cited by Vachespati-Bhattacharya. If there be an unseparated brother, senior by age and virtue, and occupied in maintaining the whole family, a younger brother has no power to give or sell either share of the whole joint estate; therefore the gift or sale is void; but, a contract made by such an elder brother is valid for both shares. . . .

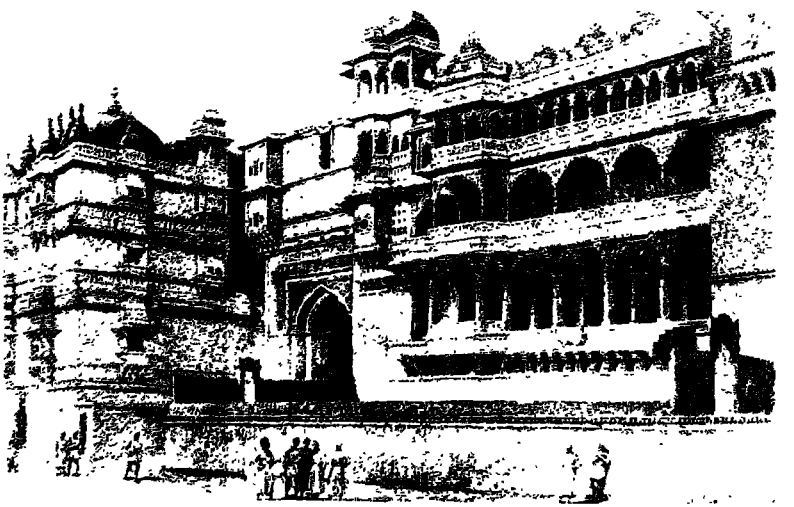
"The father has not power to give or alien, for civil purposes, gems, pearls, land or the like, which have descended from ancestors, nor immovable property even though acquired by himself. . . .

"Thus they interpret the law; but that is not satisfactory; for it has been already answered. The gift even of the immovable patrimony, for religious purposes, is valid without the assent of sons and the rest; for excellent usage has legalized such donations, and no particular ordinance is found on this point: neither Vijnyaneswara, nor any other author, expressly declares that property inherited from the paternal grandfather, and given by the father without the assent of the sons, is a void gift. Thus, in explaining the text, 'the father and sons have equal dominion, etc.' Vijnyaneswara says, the son may oppose a father attempting to give away property inherited from the paternal grandfather. Therefore, persons not their own masters, as a son, slave, or the like, are mentioned because they are nearly connected with the owner; it might on that account be doubted whether their gifts be valid. There can be no question whether a gift made by a stranger be good in law; therefore it has not been noticed. . . .

"Women and the rest being dependent in all actions generally, even the gift of female property and the like, without the assent of the husband or master, is not valid."

9. These priestly jurists were usually attached to the court of a maharajah, or prince; for India, up to the nine-

teenth century, was a congeries of hundreds of principalities (and there are even today seven hundred self-governing native 'states'); in each one ruled independently a maharajah. The kingdom of Udaipur, in Rajputana, represents the oldest, the proudest, and the purest Indo-Aryan stock; and their rajah, known specially as Maharana, or king, justly takes precedence of all maharajahs, princes, and chiefs of India; for his ancestor was the only Hindu prince who never submitted to the Mongol emperors. The rajah's palace at Udaipur[16] was a



V. 16—THE PALACE AT UDAIPUR

In this fortress-palace a household of seven thousand retainers was accommodated



V. 17 DURBAR, OR ASSEMBLY AT CHATTER

In the open court-yard in front of the palace was held the Durbar, to which in glittering jeweled ceremony came all the chiefs and vassals of the clan

fortress,—one of the many splendid structures raised all over India by the genius of those Hindu architects, the Jains, termed by the Hindus "magic-builders". In this palace of Udaipur, a household of seven thousand persons was accommodated; for the Maharana maintained an enormous staff of officials, civil and military.

In the open court-yard in front of the palace was held the Durbar, or Grand Assembly, to which in glittering jeweled ceremony came all the chiefs and vassals of the clan; this was the nearest approach to a legislative parliament that developed under the native Hindu autocracy.[17] And yet we may suppose that in its way it rendered, for the personal autocracy of the Orient, the same service—a control by public opinion—that the Occidental representative assembly supplies. A testimony is found in a famous modern statesman's eye-witness description of the Durbar at Chitral,—one of the secluded principalities in the Himalaya mountain region, where changes from ancient custom have been slowest:[m]

"[*A Durbar in Chitral.*] The government of Chitral was almost exclusively a personal government. The Mehtar [or, rajah] was supreme. He alone had the power of life and death. Theoretically, the whole property of the country belonged to him, and, in more than theory, he actually disposed of the persons and possessions of his subjects. For instance, he might and did give away men's wives As Mehtar, he was supreme in judicial as well as

in executive authority . . . In these and in all similar exercises of authority the Mehtar was assisted by a Diwan-begi or Chief Minister, and by two or three wazirs or councillors, who were constantly in his company. There were usually also two aksakals (lit. white-beards) or elders in personal attendance upon him, and a number of chief men from outlying villages who visited the court in relays, and took turns of 'waiting' upon the Mehtar.

"A real and very efficient check upon any abuse (according to Chitrali standards) of the authority thus created was furnished by the publicity with which government and justice were alike administered. Did the Mehtar dispose of wives, or confiscate property, or assess fines, or sentence to death, in any sort of secluded Star Chamber, the system could not endure. But all was done 'coram populo' in open durbar, in the presence of the people, or of as many of them as chose to attend, and in the light of heaven. Chitral, in fact, had its parliament and its democratic constitution. For, just as the British House of Commons is an assembly in which nominally all members take an equal part, but where in reality the two front benches to a large extent conduct the business, under the eyes and subject to the possible animadversion of the remainder, so in Chitral, the Mehtar, seated on a higher platform, and hedged about with a certain dignity, dispensed justice or law in sight of some hundreds of his subjects, who heard the arguments, watched the process of debate, and by their attitude in the main decided the issue. Such durbars were held on most days of the week in Chitral, very often twice in the day, in the morning and again at night."

The justice of the king was in theory personal. It was partly done by sending judicial officials to go on circuit; but special classes of cases were reserved for the king's personal hearing and decision in the Audience Hall. The second hour, or period of the day, was set apart for his

judicial business; and if the modern Hindu passion for litigation is a race-inheritance, the hour of royal justice must have been a crowded one. As inculcated in the Laws of Manu, the king, when he entered the assembly-hall, and took the seat of justice to determine lawsuits, should be accompanied by three Brahmans learned in the Veda; he was then assured that his justice was divine; and divine Justice, or Dharma, says the book of Manu, is like a mighty bull, who, if obstructed or deceived, will avenge himself on king, judges, witnesses, or parties alike. (Some of the Hindu penal methods, employed in the justice of the native princes, were characteristic of the country; but it was here the elephant, not the bull, that symbolized an avenging justice.)[18]

The procedure of this royal justice had received a full development. In a law-book by Brihaspati, about A. D. 600, the procedure is thus prescribed:[19]

[*Brihaspati's Rules for Pleading and Proof.*] "III. The Plaint. 1. The part called the declaration; the part called the answer; the part called the trial; and the part called the deliberation of the judges regarding the onus probandi: these are the four parts of a judicial proceeding.

"2. The plaint is called the first part; the answer is the second part; the trial is the third part; and the judgment is the fourth part.

"3. In the case of a denial, a judicial proceeding consists of four parts; likewise, in the case of a special plea; the same rule applies to



V. 18—Execution by Elephant
This was only one of several forms of execution by elephant

a plea of former judgment; but in the case of a confession, it has two parts only.

"4. When plaintiff and defendant come together, each claiming to be first, their declarations should be received in the order of their castes, or after considering their respective grievances.

"5. Those acquainted with the true nature of a plaint declare that to be a proper plaint which is free from the defects of a declaration, susceptible of proof, provided with good arguments, precise, and reasonable.

"6. Brief in words, rich in contents, unambiguous, free from confusion, devoid of improper arguments, and capable of meeting opposite arguments.

"7. When a plaint of this description has been proffered by the plaintiff, the defendant should tender an answer conformable to such plaint

"IV. The Answer. 1. When the plaint has been well defined, a clear exposition given of what is claimed and what not, and the meaning of the plaint fully established, the judge shall then cause the answer to be written by the defendant

"8. One should not cause to be written an answer which wanders from the subject, or which is not to the point, too confined or too extensive, or not in conformity with the plaint, or not thorough enough, or absurd, or ambiguous.

"9. If the defendant confesses, he shall state his confession; in the case of a denial, he shall cause his denial to be written; and so should he record his special plea in an answer by special plea, and his previous victory in an answer by previous victory

"V. The Trial. 1. When litigants are at issue in a court of justice, the judges, after examining the answer, shall adjudge the burden of proof to either of the two parties.

"2. The judges having heard both the plaint and the answer,

and determined to which party the burden of proof shall be adjudged, that person shall substantiate the whole of his declaration by documents or other proofs.

"3. The plaintiff shall prove his declaration, and the defendant his special plea; victory in a previous trial shall be proved by a document recording that victory

"5. One who absconds after receiving the summons; one who remains silent; one convicted of a crime by the depositions of witnesses; and one who admits the correctness of the charge: such are the four losers of their suit.

"6. One who absconds loses the suit after three fortnights; one who remains silent, after a week; and one convicted by the witnesses, or confessing his crime, all at once.

"7. He who announces witnesses and does not produce them afterwards, within thirty days or three fortnights, suffers defeat in consequence

"17. Evidence is declared to be twofold, human and divine. Each of these is again divided into a number of branches by sages declaring the essence of things.

"18. Human evidence is threefold, as it consists of witnesses, writings, and inference. Witnesses are of twelve sorts; writings are declared to be tenfold; inference is twofold; divine test is ninefold.

"19. In the case of an answer of the first or third kinds, divine and human proof should be employed; but in the case of an answer of the fourth kind, an attested document recording the success of either party should be produced."

A special feature of Hindu remedial procedure (apparently akin to the racial development of practical psychic powers) was the method of moral or superstitious suasion, in which the injured person proceeded to

starve himself and thus compelled the wrongdoer to come to terms. Essentially religious in origin, and analogous to the curse of the Keltic Druids, the tabu of the Polynesians, and the suicide-threat (by "hara-kiri") in Japan, it occupied in India a more distinctive place in legal procedure; for it attracted the comments of many foreign observers, from Sir Henry Maine in modern times back through several centuries. Here is one form of it, as observed by a reliable Italian traveler about A. D. 1500:[o]

[*Procedure to Collect a Debt.*] "When any one ought to receive money from another merchant, there appearing any writing of the scribes of the king (who has at least a hundred of them), they observe this practice:—Let us suppose the case that some one has to pay me twenty-five ducats, and the debtor promises me to pay them many times, and does not pay them; I, not being willing to wait any longer, nor to give him any indulgence, shall take a green branch in my hand, shall go softly behind the debtor, and with the said branch shall draw a circle on the ground surrounding him, and if I can enclose him in the circle, I shall say to him these words three times: 'Bramini raza pertha polle'; that is, 'I command you by the head of the Brahmins and of the king, that you do not depart hence until you have paid me and satisfied me as much as I ought to have from thee.' And he will satisfy me, or truly he will die there without any other guard. And should he quit the said circle and not pay me, the king would put him to death."

10. The administration of the law in early and medieval Brahman India seems to have impressed favorably all observant travelers at various epochs. Diodorus of Sicily, for example, just before the Christian era, re-

cords briefly that "their judges decide the lawsuits diligently, and deal severely with the offenders."[p] The geographer Strabo, writing about A. D. 20, and relying mainly on the recorded observations of Alexander's companions, three centuries earlier, found much to admire in Indian law (and he rarely noticed the laws of the many countries he described):[pp]

"All the Indians are frugal in their mode of life, and especially in camp. They do not tolerate useless and undisciplined multitudes, and consequently observe good order. Theft is very rare among them. Megasthenes, who was in the camp of Sandrocottus, which consisted of 400,000 men, did not witness on any day thefts reported which exceeded the sum of two hundred drachmae, and this among a people who have no written laws, who are ignorant even of writing, and regulate everything by memory. They are, however, happy on account of their simple manners and frugal way of life The simplicity of their laws and contracts appears from their not having many lawsuits. They have no suits respecting pledges and deposits, nor do they require witnesses or seals, but make their deposits, and confide in one another. Their houses and property are unguarded. These things denote temperance and sobriety Megasthenes says, that none of the Indians employ slaves. But, according to Onesicritus, this is peculiar to the people in the territory of Musicanus. He speaks of this as an excellent rule and mentions many others to be found in that country, as the effects of a government by good laws."

An Arab traveler, ten centuries later, declared emphatically:[q]

"Justice is a natural instinct among the inhabitants of India, and they hold nothing in equal estimation. It is stated that their

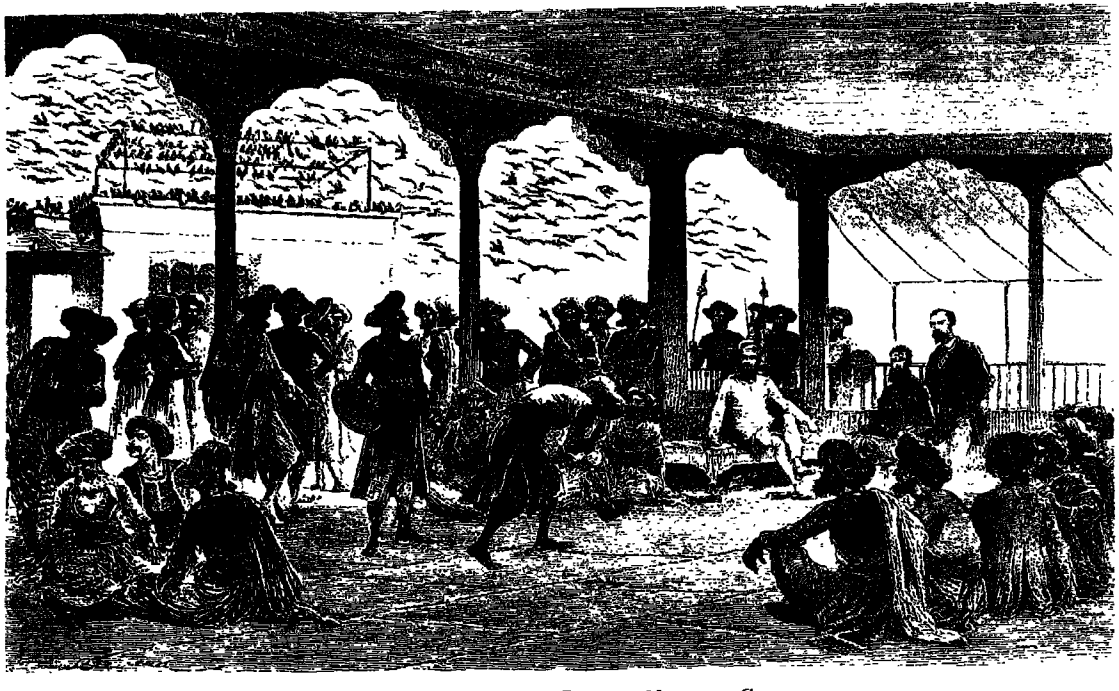
numbers and prosperity are due to their integrity, their fidelity in fulfilling engagements, and to the general uprightness of their conduct. It is, moreover, on this account that visitors to their country have increased, that the country flourishes, and that the people thrive in plenty and in peace."

And another Arab traveler testified:

"Security and justice are so firmly established in this city, that the most wealthy merchants bring thither from maritime countries considerable cargoes, which they unload, and unhesitatingly send into the market and bazaars, without thinking in the meantime of any necessity of checking the account, or of keeping watch over the goods."

But in later times, after British colonists and travelers had arrived, the picture is not so favorable. Bribery of officials and perjury of suitors are reported as undermining popular faith in the justice dispensed in the native courts. An English visitor of the 1700's thus describes the proceedings:[r]

[*Administration of Justice.*] "No man is refused access to the Durbar, or seat of judgment; which is exposed to a large area, capable of containing the multitude.[19] The plaintiff discovers himself by crying aloud, Justice! Justice! until attention is given to his importunate clamours. He is then ordered to be silent, and to advance before his judge; to whom, after having prostrated himself, and made his offering of a piece of money, he tells his story in the plainest manner, with great humility of voice and gesture, and without any of those oratorical embellishments which compose an art in freer nations.—The wealth, the consequence, the interest, or the address of the party, become now the only considerations. He visits his judge in private, and gives the jar of oil: his adversary



V. 19—The Gaikwar of Baroda Holding Court

bestows the hog which breaks it. The friends who can influence intercede; and, excepting where the case is so manifestly proved as to brand the failure of redress with glaring infamy (a restraint which human nature is born to reverence), the value of the bribe ascertains the justice of the cause.—This is so avowed a practice, that if a stranger should inquire how much it would cost him to recover a just debt from a creditor who evaded payment, he would everywhere receive the same answer; the government will keep one-fourth and give you the rest. Still, the forms of justice subsist; witnesses are heard, but brow-beaten and removed; proofs of writing are produced, but deemed forgeries and rejected, until the way is cleared for a decision, which becomes totally or partially favourable, in proportion to the methods which have been used to render it such; but still with some attention to the consequences of a judgment which would be of too flagrant iniquity not to produce universal detestation and resentment.

"Providence has, at particular seasons, blessed the miseries of these people with the presence of a righteous judge. The vast reverence and reputation which such have acquired are but too melancholy a proof of the infrequency of such a character. The history of their judgments and decisions is transmitted down to posterity, and is quoted with a visible complacency on every occasion. Stories of this nature supply the place of proverbs in the conversations of all the people of Indostan, and are applied by them with great propriety."

An eminent French missionary of the early 1800's, after thirty years of intimate observation, recorded this opinion of the methods of justice in the Madras region:[8]

[*Quality of Hindu Justice.*] "Governed from time immemorial by despotic princes, who recognized no law but their own free will and pleasure, India has been accustomed to a form of judicial administration peculiar to herself. There has been no legal code,

neither has there been any record of legal usage. There are, it is true, a few works containing general legal principles, and a few wise legal maxims which have helped to guide the judges in their decisions; yet nowhere have there been properly organized courts of justice. Ordinary cases have generally been settled, without any right of appeal, by the collectors of public revenue, assisted by assessors selected from the principal inhabitants and by the military officer commanding the district.

"The Hindus have neither barristers nor solicitors; neither are they compelled to submit to those long proceedings and interminable delays, the cost of which often equals the value of the matter under dispute. When it is a question of dividing property or of other business of any importance, it is generally submitted to the arbitration of relatives or of the headmen of the caste; and if the nature of the suit or the high rank of the litigants render it advisable, all the principal inhabitants of the district assemble to decide the point at issue.

"When a case is brought before the revenue officer of the district and his assessors, no difficulty is experienced in getting them to settle the dispute if they think that they are likely to make any money out of it. Otherwise they will easily invent some pretext for putting off the matter till some future time when they may have more leisure to attend to it. In any important case they try their best to bring the parties to an amicable understanding; and if that is impossible, they leave the decision to a 'panchayat', or tribunal of five arbitrators, which may be composed of a larger, but never of a smaller number than five. If caste customs are the subject of dispute, the settlement devolves upon the heads of the castes. The procedure generally followed is that dictated by common sense, by ordinary intelligence, and by such principles of equity as one always expects to find established, in theory at any rate, in all civilized countries. Besides, almost every member of a caste is well acquainted with its different customs, which are handed down by

tradition from father to son, and thus are never lost. In short, the form of judicial procedure in India is less complicated than that of Europe, and would leave little to be desired if the scales of Themis were not much more easily put off their balance there than in other countries.

"Impartiality and disinterestedness are virtues with which Hindu judges have but a very slight acquaintance. Too weak to be able to resist the bribes that are offered them, or to be independent of the prejudices and predilections of their own circle, or to be above all considerations of personal interest, their judgments are rarely conspicuous for unswerving uprightness and integrity. Almost invariably it is the richer suitor who gains the day; and even the most guilty generally find some means of blunting the sword of justice. If the parties to a suit have an equally good case or an equally bad one, the party which makes the most noise and is loudest in its abuse of its adversary usually gains the day, for eloquence at the Indian bar consists in shouting with all the strength of one's lungs, and in pouring such a flood of invective on one's adversary that he has not an answer left.

"There are two or three Hindu works which contain rules and directions concerning the administration of justice, both civil and criminal Many legal precepts and decisions, which would be most useful helps to a judge, might be gathered from these works; but, as usual, they are immersed in a farrago of nonsense, religious and otherwise. For instance, one may find there numbers of decisions in hypothetical cases that are either perfectly ridiculous or morally impossible, and also numbers of idiotic theses propounded 'ex cathedra'. Furthermore, whatever valuable information may be found here and there in these books is quite beyond the comprehension of the majority of Hindus, who do not in the least understand the learned terms in which they abound

"In civil as well as in criminal cases, when the evidence does not

completely establish a fact, the Hindus often have recourse to ordeals to decide the point at issue. There are four ordeals generally recognized among Hindus, namely, by the scales, by fire, by water, and by poison. It is not the magistrates only who order these trials by ordeal. Anyone has the right to insist on such a trial. Thus, if a theft has been committed, the head of a household compels each member to undergo an ordeal. In the same way, the head of a village may force it upon all the inhabitants on whom criminal suspicion may rest; and a jealous husband may order the same in the case of his wife whose fidelity he doubts. These ordeals sometimes produce such an effect on the real culprits that they are convinced that discovery is inevitable, and think it more prudent to confess their guilt at once than to aggravate the matter by keeping silence. On the other hand, such ordeals often occasion deplorable miscarriages of justice, and result in the conviction of innocent persons, who, strong in the knowledge of their innocence, fondly believe that the natural course of things will be reversed in their favour

"No doubt the disregard of the sanctity of an oath prevailing among the Hindus has, to a certain extent, necessitated the adoption of this system of trial by ordeal. Certain it is that there is no nation in the world who think so lightly of an oath or of perjury. The Hindu will fearlessly call upon all his gods—celestial, terrestrial, and infernal—to witness his good faith in the least of his undertakings; but should fresh circumstances demand it, he would not have the smallest scruple in breaking the word that he had so solemnly pledged. Woe to the imprudent person who confides to Hindus any private matter that affects his fortune, his honour, or his life! If it served their purpose, they would divulge it without any hesitation. The unscrupulous manner in which Hindus will perjure themselves is so notorious that they are never called upon to make a statement on oath in their own courts of justice, unless they are persons who bear an exceptionally high character.

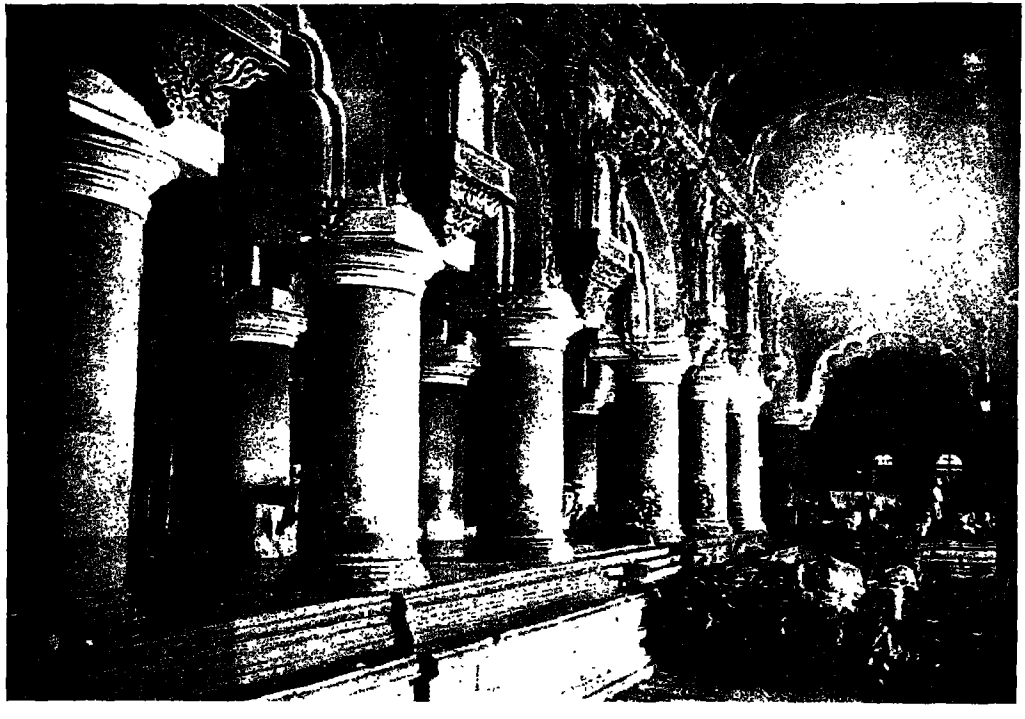
10. *Administration of Justice*

"But the jurisprudence of the Hindus, like the rest of their political institutions, has undergone a complete change since a great European Power has dominated the country. Regular courts of justice have been established at great expense in every district to protect the rights and settle the differences of persons of all classes, irrespective of rank, position, and caste. And this is, undoubtedly, one of the greatest benefits that a just and enlightened Government can bestow on any country."

But in valuing the credit to be given to these variant opinions, four circumstances must be kept in mind (and they apply more or less to any alien observer's accounts of Oriental justice). In the first place, as to the extent of parties' perjury, few observers are qualified to pronounce a comparative judgment. An English trial judge, in 1895, who had long held court in India, thus recorded his opinion of the comparative prevalence of perjury in England and in India: "In India, no doubt, there was a good deal of lying, but many of the lies were of a stereotyped form (like fictitious averments in our pleading); and I certainly think it harder to get at the truth in an English local court than it was in a local court of North-west India." In the second place, as to bribes (alias gifts) to judges, it must be remembered that the practice of suitors' gifts to court officers (the progenitor of our modern court fees) survived long in Europe; that in France as late as the 1600's all judicial officers purchased their posts from the king (the chief justice paid upwards of 500,000 livres)

and reimbursed themselves from the suitors' fees; and that in the early 1700's an English Chancellor was impeached for selling the appointments to masterships in chancery in accordance with old custom. In the third place, in those countries of the Orient where the autocratic ruler dispensed personal justice, the quality of justice depended much on the ruler's personality, and therefore varied from reign to reign, between good and bad. And in the fourth place, in a country like India, composed of scores of extensive independent domains, the quality of justice varied in different regions.[20] Thus different observers might have different reports to make.

11. During the seven centuries of Mohammedan rule, over a large part of India this Brahman-Hindu law was more or less in abeyance; it obtained only as customs of the conquered race, ignored or barely tolerated; and fewer law books were written in this period. But when the English came to rule India, late in the 1700's, the Hindu law books were restored to full prestige (and for a while, as some maintain, to even a greater prestige than they had ever enjoyed under the native rulers). The Hindu pundits, or jurists, were called in to advise the English judges in all lawsuits dealing with Hindus. The manner of applying the Hindu law in the earlier English courts may be seen from the following decision, in the year



V. 20—Audience Hall at Madura

1815; the rule of law here applied is expounded in the Hindu texts already quoted from Jagannatha's Digest:[1]

[*An English Judicial Opinion.*] "*Bishwa-nath Dutt* versus *Durga-prasad Dey* and *Shib-chander Dey.*

"EAST, C. J.—This was an action of ejectment for some premises, containing altogether five Katas and fifteen Chhataks, with a dwelling-house at Arkuli in Calcutta, of which Nil-mani Dey, who died between nineteen and twenty years ago, was the patrimonial owner. It appears by the evidence of one of the family that Nil-mani, for the last two or three years of his life, had been insane and incapable of work, and that his wife was obliged to dispose of all his personal property in support of him and his family during his malady. At his death he left his widow Abhoya and three infant children, two sons, and an unmarried daughter. Those sons are the present defendants. At his death there was nothing left for the subsistence of his family but the property in question, and another small piece of ground, containing five Katas and a half, which he had purchased a short time before his derangement.

"The present lessor of the plaintiff claims under a deed of purchase, in reality from the widow, but nominally from her and her eldest son, both being parties to the deed, dated 15th Agrahayan 1203 B.S., nearly twenty years ago, for the price of Rs. 218. It is not disputed that the price was fair at the time; and it appears to have been an open and avowed transaction; but it was also admitted that, at that time, Durga-prasad, the eldest of the two infant sons, and who was a nominal party to the deed, was only seven or eight years of age.

"The right, therefore, if any, of the widow to dispose of this property arose and was put upon the ground of necessity, for the support and subsistence of herself and her children. This formed the first and principal point which was made, and on which the opinion of the pundits was taken as follows:—

11. Brahman Law Revived

"Question to Pundits: 1. Can a Hindu widow, having infant sons, sell the property of those sons to a stranger under any circumstances of want? Answer: She may, to preserve the children from want, and that without consulting the rest of the family. Q. 2. By what authority? A. 2. The Daya-tattwa, the Daya-bhaga, and the Vivada-chintamani. Q. 3. If there be a widow and brother of the father's side, and infant children, who is to manage for the family, whether divided or undivided? A. 3. If the family were undivided, the uncle of the children has the management. If divided, the widow has it, but in cases of emergency she will consult the relations of her husband. Q. 4. Suppose she sold the property without consulting those relations, would the sale be binding? A. 4. It is necessary for her to consult the relations; but if they refuse, then she may sell without their consent, as much as is necessary for the purpose. But she can, in cases of emergency, sell without. Those cases of emergency are, the subsistence of a child, the portion of a daughter, and a shraddha. Q. 5. If the widow have the means of subsistence from the support of the family, can she then sell the property? A. 5. Not so, if she have support.

"In addition to these opinions of our own pundits, we desired this case to stand over, in order to learn what the opinions of other pundits might be, as I had been informed that the same question was then actually pending before the Mofusil court of appeal, and that Mr. Watson, the judge, had desired the opinion of the Mofusil pundits to be taken upon the points: and I have been since informed, that, in the course of our last vacation, those opinions having been taken, were in conformity to the opinion of our own pundits; and that judgment was given accordingly by the court of appeal in favour of the widow's right to sell in cases of necessity.

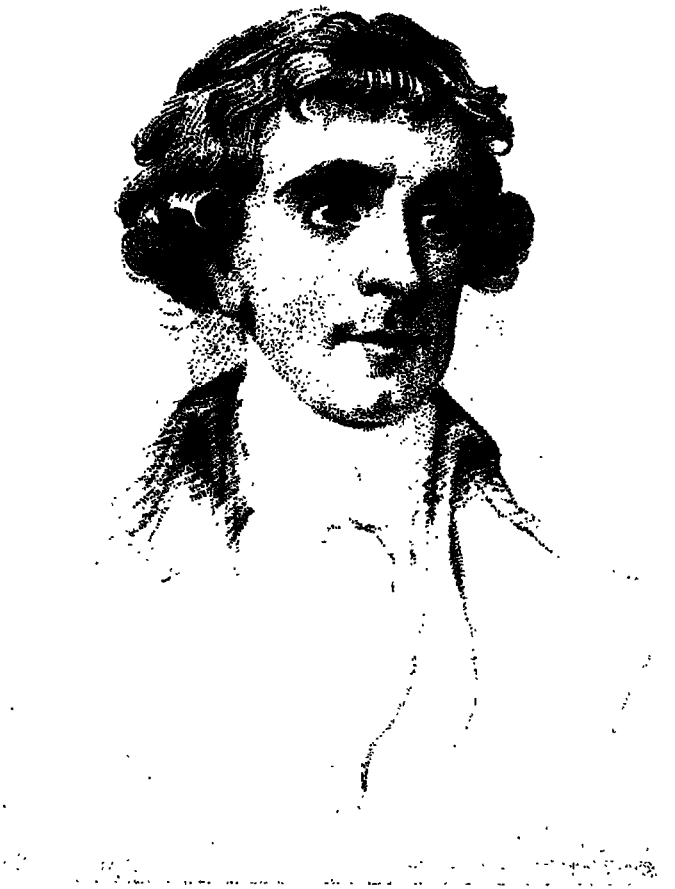
"In truth, it seems that such a power is founded in necessity and good sense, in a country where there is no public provision for the poor; for otherwise it might happen that a child's life might be sacrificed for preserving his property.

"The only question, therefore, which remains, is, whether the necessity, from which the power arises, did in fact exist in this case.

"On these grounds we think that the purchase was well made, and that there should be judgment for the lessor of the plaintiff, who had been in possession under the purchase-deed for nearly nineteen years before he was lately ousted by a judgment in ejectment snapped against him. Judgment for the plaintiff. 4th July, 1815."

12. Meanwhile, however, the Sanskrit language, the vehicle of these hundreds of volumes of Hindu law, had remained totally unknown to Europe. How completely shut off India had been from Europe may be realized from the circumstance that no European had ever seen an Indian sovereign face to face in official intercourse, from the time of Alexander the Great down to the arrival of the English commercial envoy in the time of James I,—an interval of nearly 2000 years. But in 1786, a young English lawyer, William Jones,[21] author of one of our earliest scholarly law-books, Jones on Bailments, but also an accomplished linguist, with a fondness for Oriental poetry, went out to India as a judge, in the government of Warren Hastings. Jones, browsing curiously among the native poetry, stumbled upon this elaborate law-book of Manu, written in Sanskrit.

His discovery thrilled his linguistic zeal; he translated it into English; it was published in 1794. His studies soon revealed to scholars of the western world the immense



V. 21—Sir William Jones

significance of the Sanskrit language; and the modern science of comparative philology, which now fascinates hundreds of the world's scholars, and the modern theory of a primitive Aryan race, which revolutionized our conceptions of ethnology, were the wonderful outgrowths of this young lawyer's enlightened curiosity.

Since his time, the beneficent British policy, in contrast to the ruthless despotic contempt shown for the Brahman law by the original Turkish and Mongol conquerers, is to let each people live according to its own traditions and customary law.

When the English first undertook to superintend the administration of justice in India, it was believed that the Hindu law-books, founded on the Brahman religious system, represented in all details the rules actually in force for the Hindu communities. But by the middle of the nineteenth century the truth began to be discovered that the local customs, especially in land tenure and inheritance, and the customs of castes, guilds, and families, were and always had been a principal, if not the prime source of local law; and that the religious law-books did not always reflect these customs, and were referred to (in some regions and on some topics at least) only as a secondary source,—somewhat as the classic Roman law-books were later used by the Germanic peoples of Europe.

Moreover, the Brahman pundits, in the composition of their books, were apt to write as chambered scholars seeking the logical perfection of the system; they pictured an ideal of the law as it ought to be, in Brahman conception; so that many parts of their law-treatises are speculative and fantastically unreal, elaborating rules which never could have been law in practice. (In this respect, the parallel is striking between their books and those of the Irish Keltic books, *post*, Chap. X, composed by the Brehons, or priestly jurists).

The controversy over the extent of the validity of the Hindu jurists' treatises has not even yet been fully settled. However, scores of them have been edited and translated and used in the courts, during the past hundred years; long series of decisions and ordinances have enforced their rules; and they now form the warp and woof of the private law for Hindus.

And that law is interpreted for the Hindu people largely by their own kindred. For example, in the judicial establishment of Bengal, including the High Court at Calcutta,[22] a modern civil service list showed that, out of some four hundred and sixty judges, only sixty were Englishmen, while four hundred were Hindus. And in the Law College of Calcutta University, the president of the college was a Hindu, and the English lecturers num-

bered only two, while the Hindu lecturers numbered fifty-three.

Thus the rights of two hundred millions of Hindu population are still determined mainly according to the texts and customs of this Hindu legal system, which traces its origin back for 3000 years, to the ancient Aryan invaders,—the contemporaries of Moses, of Confucius, and of Ramses.



V. 22—The High Court at Calcutta

Sources of Illustrations

1. *Map of India, B. C. 250.* From the map in *T. W. Rhys-Davids*, "Buddhist India", p. 320 (New York, Putnam's, 1903).
2. *Scripts of Principal Law Languages.* From the table in *H. H. Wilson*, "Glossary of Judicial and Revenue Terms, etc., of British India", p. xi (London, 1855).
3. *Audience Hall at Delhi.* From a view in the collection of the Art Institute of Chicago.
4. *Hall of Judgment at Agra.* From a view in the collection of *J. W. Butcher*, London.
5. *Siamese Court Record.* From a photograph of the original in the possession of *Eldon R. James*, Esq., formerly Legal Adviser to the King of Siam, now Librarian of the Harvard Law School.
6. *Land-Grant of B. C. 23.* From the facsimile in *Charles Wilkins*, "A Royal Grant of Land engraved on a Copper-Plate, 23 B. C." (Asiatic Researches, vol. I, London, 1806, p. 123).
7. *Land-Grant of A. D. 1000.* From the facsimile in *A. F. R. Hoernle*, "The Gauhati Copper-Plate Grant of Indrapola", plate II (Journal of the Asiatic Society of Bengal, vol. LXVI, part I, 1897).
8. *King Asoka's Edict.* From the facsimile in *James Burgess* and *George Buhler*, "Archaeological Survey of Southern India: the Buddhist Stupas of Amaravati and Jaggayyapeta", Edict VI, plate LXIV and page 123 (London, Trubner, 1887).
9. *Filipino Script, A. D. 1600.* From the facsimile in *Ignacio Villamor*, associate justice of the Philippine Islands Supreme Court, "The Ancient Filipino Writing", p. 44 (Manila, 1922).
10. *Dhammathat.* From the text in *D. Richardson*, "The Damathat, or The Laws of Menoo translated from the Burmese", p. 17 (Rangoon, Hanthawaddy Press, 1904).
11. *Audience at the Court of Burma.* From the drawing in Sir *Henry Yule*, "Narrative of a Mission sent by the Governor General of India to the Court of Ava", p. 84 (London, Smith Elder, 1858); photograph furnished by *W. C. Lane*, Esq., Librarian of the Harvard University Library.
12. *Old and New Justice Buildings in Siam.* From "Siam and Laos as seen by our American Missionaries", p. 340 (Phila., Presbyterian Board of Publications, 1884), and *A. Cecil Carter*, ed. "The Kingdom of Siam", p. 186 (New York, Putnam, 1904).

V. Hindu Legal System

13. ***Siamese Modern Supreme Court.*** From a photograph in the Yale University Law School, obtained by *Eldon R. James*, Esq., formerly Legal Adviser to the King of Siam, for Hon. G. P. Ingersoll, formerly United States Minister to the Court of Siam.
14. *Laws of Manu* (*Sanskrit*). From a page of the edition by *Julius Jolly*, "Manava-Dharma Sastra", VIII, 1-6 (1887).
15. *Village Trial Scene.* From a drawing in *Louis Rousselet*, "India and its Native Princes", p. 418 (London, Chapman & Hall, 1876).
16. *Palace at Udaipur.* From a view by the McIntosh Stereopticon Co., Chicago.
17. *Durbar at Udaipur.* From a drawing in *Rousselet* (cited *supra*), p. 166.
18. *Execution by Elephant.* From a drawing in *Rousselet* (cited *supra*), p. 114.
19. *The Gaikwar of Baroda Holding Court.* From a drawing in *Rousselet* (cited *supra*).
20. *Audience Hall at Madura.* From a drawing in "Bilder-Atlas", vol. V, Architecture, plate 18, fig. 2 (Brockhaus, Leipzig, 2d ed. 1875).
21. *Sir William Jones.* From the frontispiece to vol. I of his "Collected Works" (ed. 1807).
22. *High Court at Calcutta.* From the illustration in *H. D. Traill*, "The Capitals of the World", p. 506 (New York, Harpers, 1894).

Sources of Documents Quoted in Text

a. Land-Grant B. C. 23. From the translation in *Wilkins*, cited *supra*.

b. Land-Grant A. D. 1000. From the translation in *Hoernle*, cited *supra*.

c. Form of Deeds. From the translation in *H. T. Colebrooke*, "Digest of Hindu Law on Contracts and Successions, with a Commentary by Jagannatha", vol. I, p. 441 (Madras, 3d ed., 3 vols. 1864).

d. Edict of Asoka. From the translation in *Burgess & Buhler* (cited *supra*), p. 123.

e. Anecdote from Dhammathat. From the translation in *Richardson* (cited *supra*). The same expedient is noted in a Persian Chronicle.

f. King's Audience in Burma. From *Caesar Frederick's* account, in Hakluyt's Voyages, vol. X, p. 127, as quoted in *G. E. Harvey*, "History of Burma", p. 175 (London, 1925).

g. Burmese Procedure. From Capt. *Alex. Hamilton*, "A New Account of the East Indies", ch. XXXVI (Pinkerton's "Collection of Voyages and Travels", vol. VIII, p. 423, London, 1811).

h. Siamese Trial. From *Hamilton, supra*, p. 472.

i. Siamese Modern Law. From *Carter*, "Kingdom of Siam", p. 186 (cited *supra*).

j. Laws of Manu. From the translation in *Burnell*, Lecture I (cited *infra*).

k. Village Tribunal. From Lord *Frederic Hamilton*, "The Days before Yesterday", p. 310, being vol. II of "My Yesterdays" (London, Hodder & Stoughton, 3d ed., 1920).

l. Jagannatha's Digest. From the translation in *Colebrooke*, vol. I, p. 454; book II, ch. IV (cited *supra*).

m. Durbar in Chitral. From Marquess *Curzon of Kedleston*, "Leaves from a Viceroy's Notebook, and Other Papers", p. 131 (London, Macmillan, 1926).

n. Brihaspati Passage. From the translation in *Jolly*, pp. 289-297 (cited *supra*).

o. Italian Traveler. From "Travels of Ludovico di Varthema", p. 147 (cited *infra*).

p. Diodorus of Sicily. From his "Bibliotheca Historica", book II, par. XLII, vol. 2, p. 124, ed. Wesseling (cited *ante*, chap. I).

pp. Strabo. From his "Geography," b. XV, c. I, §§ 53, 54 (transl. Falconer & Hamilton, vol. III, p. 105; London, Bohn ed., 1889).

q. Arab Travelers. From *Al Idrisi*, as quoted in Sir *H. M. Elliott*, "History of India", 1867, vol. I, p. 88; and "Travels of *Ludovico di Varthema*", ed. *Badger* (Hakluyt Society Publications, 1873, vol. 32, p. 148, note 1).

r. English Traveler. From *Orme*, "The Government and People of Indostan", p. 444, as quoted in *James Mill*, "History of British India", 1840, 4th ed., vol. I, p. 216, book II, ch. 3.

s. French Missionary. From Abbé *J. A. Dubois*, "Hindu Manners, Customs and Ceremonies", ed. Beauchamp, 3d ed., 1906, p. 654, part III, ch. VIII.

t. Bishwanath Dutt case. From *Sircar*, p. 409 (cited *infra*).

V. Hindu Legal System

General References

INDIA PROPER:

A. C. Burnell, "The Ordinances of Manu, translated from the Sanskrit", edited E. W. Hopkins (London, Trubner, 1884).

Sacred Books of the East (Clarendon Press), translations of several Hindu law-texts.

Thos. Foulkes, "The Hindu Law of Inheritance, according to the Sarasvati-Vilasa" (London, Trubner, 1881).

B. H. Baden-Powell, "Land Systems of British India" (Oxford, Clarendon Press, 3 vols., 1892).

H. Cowell, "Hindu Law as administered in the Courts of British India" (Tagore Law Lectures, 1870-71, London, 1896); "History and Constitution of Courts and Legislative Authorities in India" (Tagore Law Lectures, Calcutta, 4th ed. 1899).

Julius Jolly, "Outlines of an History of the Hindu Law of Partition, Inheritance, and Adoption" (Calcutta, Tagore Law Lectures, 1883).

John D. Mayne, "Hindu Law and Usage" (London, 9th ed. 1922).

James H. Nelson, "Scientific Study of Hindu Law" (London, 1881); "Indian Usage and Judge-Made Law in Madras" (London, 1887).

J. B. Norton, "A Selection of Leading Cases on the Hindu Law of Inheritance" (Madras, 1870).

Wm. H. Morley, "The Administration of Justice in British India; its History and Present State" (London, 1858).

S. Sircar, "Vyavastha-Darpana, a Digest of the Hindu Law as current in Bengal" (Calcutta, 1867).

C. L. Tupper, "Punjab Customary Law" (7 vols. 1881); "Customary Law of Districts in the Punjab" (11 vols., 1882-1901).

A. Steele, "Law and Custom of Hindu Castes within the Dekhan Province" (Bombay, 2d ed. 1868).

Whitley Stokes, "Anglo-Indian Codes" (Oxford, 2 vols., 1888, and later editions).

Sir *Henry Sumner Maine*, "Ancient Law" (1861, and later editions); "Early History of Institutions" (1875); "Village Communities" (1876); "Early Law and Custom" (1883).

G. Sarkar, "Hindu Law" (Calcutta, 1905-6).

Sripati Roy, "Customs and Customary Law in British India" (Calcutta, Tagore Law Lectures, 1908).

Sources

E. J. Trevelyan, "Hindu Family Law as administered in British India" (London, 1908).

E. W. Hopkins, "The Growth of Law and Legal Institutions" (chapter in "Cambridge History of India", vol. I, 1922).

J. R. Gharpure, "Hindu Law" (with map of the areas of the several law-sects; Poona, 3d ed., 1921).

BURMA, SIAM, CAMBODIA:

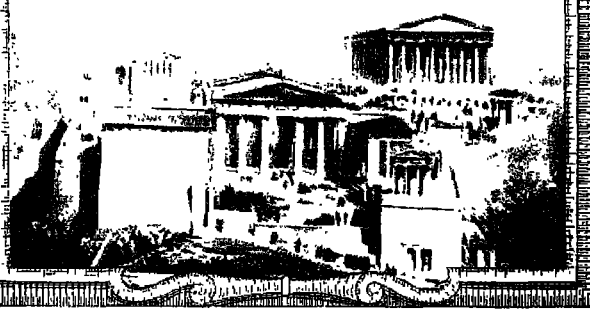
D. Richardson, "The Damathat" (cited *supra*).

J. Jardine, "Notes on Buddhist Law" (5 parts, 1883).

E. Forchhammer, "The Jardine Prize: An essay on the Sources and Development of Burmese Law" (Rangoon, 1885).

A. C. Carter, "Kingdom of Siam" (cited *supra*).

Adhémard Leclère, "Recherches sur la législation cambodgienne, droit privé" (Paris, 1890): "Recherches sur la législation pénale cambodgienne" (1894); "Recherches sur le droit public des cambodgiens" (1894).



THE GREEK LEGAL SYSTEM

Prologue to Chapter VI

Of the foregoing five earliest legal systems, the Chinese was the only one not founded on religion; in the Egyptian, the Mesopotamian, the Hebrew, and the Hindu legal systems, the law is conceived as revealed and imparted, through the ruler, directly from God, and therefore is a part of the dictates of religion. The later Mohammedan system was also of this type. With the Greeks, in their maturity, is first met a legal system that is secular, i. e. it is not conceived as a part of religion, emanating from a divine source.

The importance of this distinction, as affecting the scope and spirit of law, has been lucidly summarized by a modern scholar:[aa]

"The characteristic thing in Judaism at the beginning of our [Christian] era is not its resemblance to a church, but that it conceived itself as revealed religion, and drew all the consequences of this conception. God had not only made himself known to men, but had given them in his twofold law a revelation of his will for man's whole life, and of the way of salvation through the fulfilment of his righteous and holy will

"In this aspect Judaism falls into the same class with Zoroastrianism (the prophetic reform religion of the Iranians) and with the religions of India,—Brahmanic, heretical, and sectarian. Wherever, indeed, men have taken the idea of revealed religion seriously and logically, there a divine law, embracing not only what we call the principles of religion but their manifold application to all man's

relations to God and to his fellow-men, a law not only of rites and observances but for the civil and social side of human life, forms a large and fundamental part of the revelation. And partly under the necessity of new situations, partly by scholastic interpretation and casuistic development, it becomes progressively more comprehensive and more minute. As revelation, explicit or by clear implication, all this law has the same divine origin and authority; the infraction of even the seemingly most trivial prescription may be followed by incommensurable consequences, for it is not the trivial rule that is transgressed or neglected, but the unitary law of God which is broken.

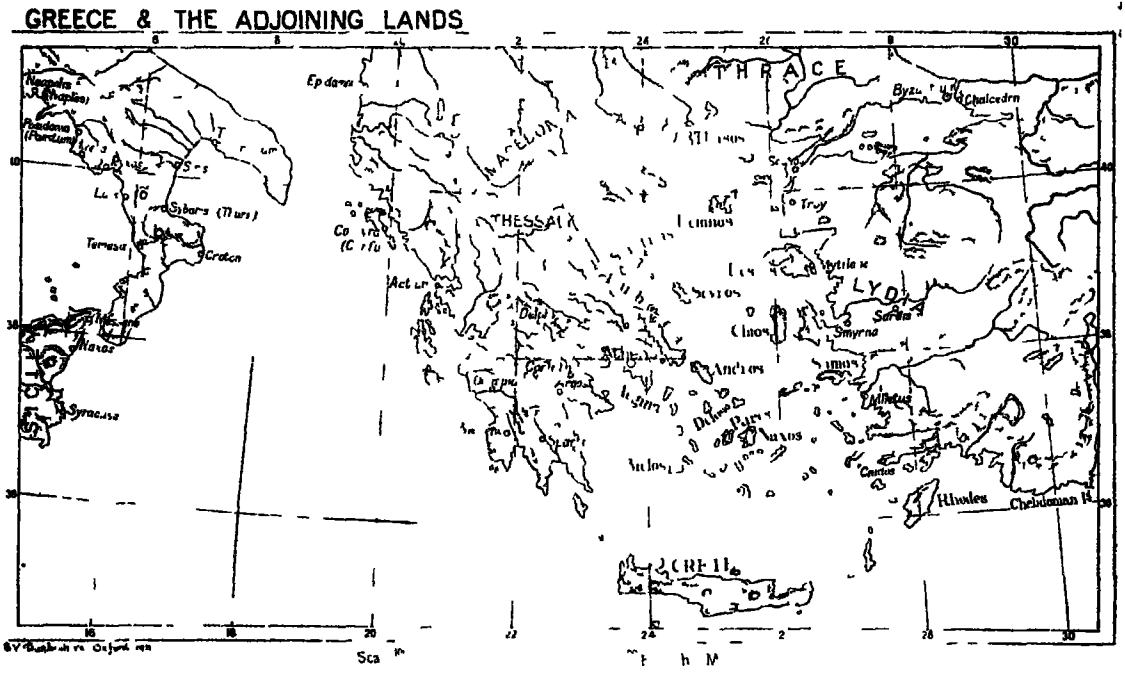
"Such religions are often called 'nomistic', that is to say, religions founded on and concluded in a law (nomos) given by God. The important thing is not what we call them, but the recognition that this development is a logical consequence of the idea of revealed religion."

With the Greeks, then, and after them the Romans, we come to secular systems of law. These two, indeed, in their earlier stages retained remnants of divinely revealed authority; but in their developed stages had become secular. All the racial systems of later origin (except the Mohammedan, which followed the Semitic instincts of the Mesopotamians and the Hebrews) were secular in their sanction.

VI

The Greek Legal System

1. Greece in the Homeric Period—The Lawsuit on Achilles' Shield—Themis—Greek justice not theocratic, but democratic.
2. Classical period—Tribunals of jurors as judges—Juries of 500 persons—Socrates' Trial.
3. Aristotle's description of the drawing of the jury and the conduct of the trial—Mock-trial of Lucian—Juries the all-powerful judges of law and of fact.
4. Civil litigation—Record of the lawsuit of Pausimachos' Heirs v. Calymna City.
5. Places of trial—Phidias' trial in the Marketplace—Trial of Orestes on the Areopagus.
6. Jury-trial and forensic oratory—Lysias, the speech-writer—Hyperides and the trial of Phryne—Demosthenes' speech in the case of Darius v. Dionysodorus—Demosthenes' speech on the Crown.
7. Legislation—Minos the first law-giver—City-laws of Gortyna—Solon the legislator—Legislative methods.
8. Conveyancing—Deed, Lease, Loan—Drainage Contract.
9. Greek Art and Literature in contrast to Greek Legal Science.



VI 1—MAP OF GREECE

VI
The Greek Legal System

THE Greek legal system extended, in tangible history, from the Homeric or Trojan period, perhaps B. C. 1200, to the absorption of Greece into the Roman system, about A. D. 300.[1] In Homeric Greece, with its numerous independent clans of freemen, we meet for the first time in legal history a new type of Justice and Law,—the democratic type.

There was never (until Alexander's time) a single unified Greek nation, an empire, under an autocratic ruler. The Greek race emerges into history as a hundred or more local tribes, or clans, or city-states, each independent, and each based more or less on democracy. In each tribe, in palaces such as that of Mycenae, the king, or chieftain, presided in patriarchal fashion. Agamemnon, king of Mycenae, and brother-in-law to fair Helen of Troy, was the most powerful chieftain of his time, and to the siege of Troy he took twelve hundred ships and the largest train of followers; he walked among his clansmen, as Homer tells us, like a bull amidst the horned herd, like unto Jove in eye and forehead. But his leadership was primarily that of a battle chieftain. And the civic justice within the tribe was done, not by his autocratic or divinely inspired royal decree, as in Egypt and Babylon and

India, but by the general assembly of the clan or tribe.

The earliest specific mention of this democratic justice is found in Homer's description of one of the scenes depicted on the splendid shield which Hephaestos made for Achilles in the Trojan war; it reads:[a]

"In the market-place
The people were assembled for a lawsuit.
The parties were disputing o'er a fine
Due for a clansman's life, who had been slain.
The killer plead that he had paid the fine,
And to the people told and proved his tale.
The other claimed that he had not been paid.
Both asked for judgment to decide the case.
Anon loud clamor favored each in turn,
For each had eager friends among the crowd,
And heralds held in check the noisy throng.
The elders of the tribe, on polished stones
Ranged round the center, sat and gravely heard.
Then, with a herald's scepter in his hand,
Each elder rose, and in his turn proposed
The judgment he advised. And in the midst
Two golden talents lay, to be the fee
Of that wise elder who should speak
The fairest judgment on the pending case."

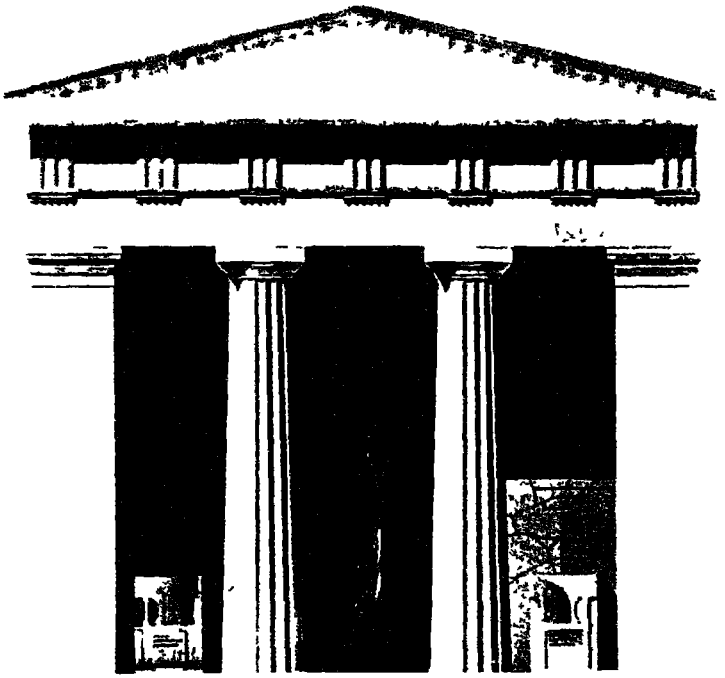
Here we see the democratic type of justice, precisely as in the primitive Germanic period, one thousand years later; the parties plead their cause before the assembly of freemen; the chief presides as umpire; then the wise elders, skilled in the law, propose various judgments;

then the freemen acclaim the best one and thus decide the case.

Themis, the goddess of justice, plays a prominent part in Greek literature; for the Greeks, though lacking political unity, had a common civilization and mythology. Themis was a consort of Zeus, and her two daughters were Dike, or morality and divine law, and Eunomia, or law and order. The Greek word "themis" and our word "doom", a judgment, are the same in etymology, and "deemster", or "doomsman", in the English Isle of Man is still the term for "judge". The goddess Themis had a temple of her own,[2] located near the famous plain of Marathon; the marble chair on the right was for Themis, on the left for Nemesis; and the statue of Nemesis, seen dimly within the temple, was made by Phidias the great sculptor.

The spirit of Greek justice, however, in classical times, was not theocratic, as in the earlier Oriental systems already described, but was secular; and civic officials, not priests, administered it.

2. The organization of justice, and the jurisdiction of the various courts, at Athens, changed from time to time, with the political fluctuations between democracy and oligarchy; but its spirit, after the reforms of Solon, and especially at the typical periods of Pericles (B. C. 450)



VI 2—Temple of Themis

This temple was near the plain of Marathon. The marble chair on the right was for Themis, on the left, for Nemesis, and the statue of Nemesis is seen within

and of Demosthenes (B. C. 350), was essentially democratic.

The trial method then was only an advanced form of the early one, in the tribal assembly, depicted by Homer on the shield. At Athens, each year a jury-list of six thousand or more names was made up. For ordinary cases, a panel of two hundred and one names (at another period, five hundred and one names), drawn by lot, might suffice; but for special cases the panel might be as many as one thousand or fifteen hundred or even twenty-five hundred jurymen. In Socrates' trial (about B. C. 400) five hundred and one jurors voted; and he was found guilty by a majority of only sixty.[b]

Under the system instituted by Solon, as it ultimately developed, an Athenian trial was entirely in the hands of non-professionals. The presiding magistrate was selected by lot, the jurors were drafted from the whole citizen body, any citizen could be prosecutor, and the defendant conducted his own case.

There were magistrates who supervised the preliminary proceedings; but at the trial, the magistrate was no more than a chairman of a public assembly. There was no presiding judge, to declare the law authoritatively. There was no appeal, in the modern sense. The citizens were the whole court,—judges of law and of fact, without

control. There was no jury-deliberation. After the evidence and speeches, all filed out, casting their ballots in the verdict-urn as they departed.

The trial of Socrates, above referred to, was (what we should call) a criminal prosecution. In such prosecutions, the penalty was for some classes of cases fixed beforehand by law (or by agreement), and for others was left to the jury to determine; Socrates' offences—impiety and the corruption of youth—were of the latter sort. In such cases, the first verdict pronounced upon guilt only; and if the verdict was guilty, a second hearing and vote took place to determine the penalty. It was between these votes that Socrates (in Plato's report) delivered his celebrated speech on the penalty due him. In its noble nonchalance, it is unequalled. Socrates calmly declared, to the jurors who had condemned him, that he did not fear their highest penalty—death; for, he said, "the difficulty, my friends, is not in avoiding death, but in avoiding unrighteousness; for that pursues us faster than death".— Socrates was the expounder (though not the inventor) of the great art of cross-examination as a mode of extracting truth; an art which the philosophers, in modern times, have misguidedly abandoned to the lawyers. And even during those thirty days of imprisonment that elapsed before the fatal cup of hemlock was handed to him,[s] and while he sat in chains, conversing with his

2. *Trial Method*



VI. 3—Socrates in Prison, Drinking the Fatal Hemlock

disciples in those masterpieces of dialogue transmitted to us by Plato, we find him still shrewdly and genially wielding that wonderful weapon of cross-examination, in discussing the immortality of the human soul.

3. Athenian law and justice had come to turn essentially on the jury-system, and it was elaborately organized, in the city's constitution. So dominant is this feature, for making any estimate of Greek law and justice, that Aristotle's detailed account of the procedure must here be quoted. This text of Aristotle's monograph on the "Government of Athens", lost for more than two

thousand years, came to light some forty years ago, in a papyrus discovered in Egypt (under strange circumstances never yet fully revealed in print); and that portion of the fragments describing the jury-system was completely reconstructed only in 1903, and published in translation only in 1920.[d] It reads as follows:[e]

[*Aristotle's Account of the Jury-System.*] "Ch. 63. [*Drawing the Juries by Lot.*] The juries for the law-courts are chosen by lot by the nine Archons, each for their own tribe, and by the clerk to the Thesmothetae for the tenth. There are ten entrances into the courts, one for each tribe; twenty rooms in which the lots are drawn, two for each tribe; a hundred chests, ten for each tribe; other chests, in which are placed the tickets of the jurors on whom the lot falls; and two vases. Further, staves, equal in number to the jurors required, are placed by the side of each entrance; and counters are put into one vase, equal in number to the staves. These are inscribed with letters of the alphabet beginning with the eleventh (lambda), equal in number to the courts which require to be filled. All persons above thirty years of age are qualified to serve as jurors, provided they are not debtors to the state and have not lost their civil rights. If any unqualified person serves as juror, an information is laid against him, and he is brought before the court; and, if he is convicted, the jurors assess the punishment or fine which they consider him to deserve. If he is condemned to a money fine, he must be imprisoned until he has paid up both the original debt, on account of which the information was laid against him, and also the fine which the court has imposed upon him. Each juror has his ticket of boxwood, on which is inscribed his name, with the name of his father and his city-ward, and one of the letters of the alphabet up to kappa;* for the jurors in their several tribes are divided into

*[The tenth letter of the alphabet. Thus the whole body of jurors was divided into ten sections, indicated by the letters from alpha to kappa; and the courts for which jurors were required were indicated by the requisite number of letters from lambda onwards.]

VI 4—ARISTOTLE'S TREATISE ON THE GOVERNMENT OF ATHENS

ten sections, with approximately an equal number in each letter. When the Thesmothetes has decided by lot which letters are required to attend at the courts, the servant puts up above each court the letter which has been assigned to it by the lot.

"Ch. 64. [*Assigning the Juries to the Different Courts.*] The ten chests above mentioned are placed in front of the entrance used by each tribe, and are inscribed with the letters of the alphabet from alpha to kappa. The jurors cast in their tickets, each into the chest on which is inscribed the letter which is on his ticket; then the servant shakes them all up, and the Archon draws one ticket from each chest. The individual so selected is called the Ticket-hanger, and his function is to hang up the tickets out of his chest on the bar which bears the same letter as that on the chest. He is chosen by lot, lest, if the Ticket-hanger were always the same person, he might tamper with the results. There are five of these bars in each of the rooms assigned for the lot-drawing. Then the Archon casts in the dice and thereby chooses the jurors from each tribe, room by room. The dice are made of brass, coloured black or white; and according to the number of jurors required, so many white dice are put in, one for each five tickets, while the remainder are black, in the same proportion.* As the Archon draws out the dice, the crier calls out the names of the individuals chosen. The Ticket-hanger is included among those selected. Each juror, as he is chosen and answers to his name, draws a counter from the vase, and holding it out with the letter uppermost shows it first to the presiding Archon; and he, when he has seen it, throws the ticket of the juror into the chest on which is inscribed the letter which is on the counter, so that the juror must go into the court assigned to him by lot, and not into one chosen by himself, and that it may be impossible for any one to collect the jurors of his choice into any particular court. For this purpose

*[Thus the process of selection is as follows: The Ticket-hanger arranges all the tickets on a bar, which establishes their order. Then the Archon draws a die; if it is white, the owners of the first five tickets on the bar serve on the jury, while if it is black they are rejected; and so on through the whole number. The selected jurors are then assigned to the several courts in accordance with the lots drawn from the vases.]

chests are placed near the Archon, as many in number as there are courts to be filled that day, bearing the letters of the courts on which the lot has fallen.

"The juror thereupon, after showing his counter again to the attendant, passes through the barrier into the court. The attendant gives him a staff of the same colour as the court bearing the letter which is on his counter, so as to ensure his going into the court assigned to him by lot; since, if he were to go into any other, he would be betrayed by the colour of his staff. Each court has a certain colour painted on the lintel of the entrance. Accordingly the juror, bearing his staff, enters the court which has the same colour as his staff, and the same letter as his counter. As he enters, he receives a voucher from the official to whom this duty has been assigned by lot. So with their counters and their staves the selected jurors take their seats in the court, having thus completed the process of admission. The unsuccessful candidates receive back their tickets from the Ticket-hangers. The public servants carry the chests from each tribe, one to each court, containing the names of the members of the tribe who are in that court, and hand them over to the officials assigned to the duty of giving back their tickets to the jurors in each court, so that these officials may call them up by name and pay them their fee.

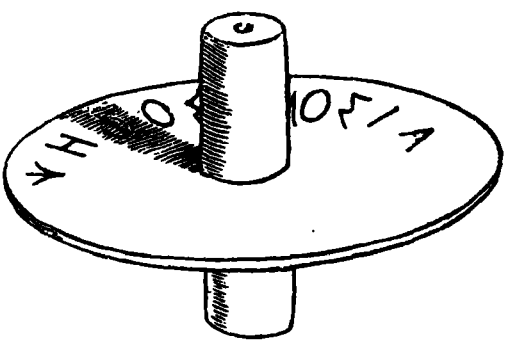
"Ch. 66. [*Organizing the Court.*] When all the courts are full, two ballot boxes are placed in the first court, and a number of brazen dice, bearing the colours of the several courts, and other dice inscribed with the names of the presiding officials. Then two of the Thesmothetae, selected by lot, severally throw the dice with the colours into one box, and those with the officials' names into the other. The official whose name is first drawn is thereupon proclaimed by the crier as assigned for duty in the court which is first drawn, and the second in the second, and similarly with the rest. The object of this procedure is that no one may know which court he will have, but that each may take the court assigned to him by lot.

"When the jurors have come in, and have been assigned to their respective courts, the presiding official in each court draws one ticket out of each chest (making ten in all, one out of each tribe), and throws them into another empty chest. He then draws out five of them, and assigns one to the superintendence of the water-clock, and the other four to the telling of the votes. This is to prevent any tampering beforehand with either the superintendent of the clock or the tellers of the votes, and to secure that there is no malpractice in these respects. The five who have not been selected for these duties receive from them a statement of the order in which the jurors shall receive their fees, and of the places where the several tribes shall respectively gather in the court for this purpose when their duties are completed; the object being that the jurors may be broken up into small groups for the reception of their pay, and not all crowd together and impede one another.

"Ch. 67. [*Conduct of the Trial.*] These preliminaries being concluded, the cases are called. If it is a day for private cases, the private litigants are called. Four cases are taken in each of the categories of actions defined in the law, and the litigants swear to confine their speeches to the point at issue. If it is a day for public causes, the public litigants are called, and only one case is tried. Water-clocks are provided, having small supply-tubes, into which the water is poured by which the length of the pleadings is regulated. Ten gallons are allowed for a case in which an amount of more than five thousand drachmas is involved, and three for the second speech on each side. When the amount is between one and five thousand drachmas, seven gallons are allowed for the first speech and two for the second; when it is less than one thousand, five and two. Six gallons are allowed for arbitrations between rival claimants, in which there is no second speech. The official chosen by lot to superintend the water-clock places his hand on the supply-tube whenever the clerk is about to read a resolution or law or affidavit or contract. When, however, a case is conducted according to a set measurement

of the day, he does not stop the supply, but each party receives an equal allowance of water.* The standard of measurement is the length of the days in the month Poseideon The measured day is employed in cases when imprisonment, death, exile, loss of civil rights, or confiscation of goods is assigned as the penalty.

"Most of the courts consist of 500 members ; and when it is necessary to bring public cases before a jury of 1,000 members, two courts combine for the purpose, while the most important cases of all are brought before 1,500 jurors, or three courts. The ballot balls are made of brass with stems running through the centre, half of them having the stem pierced and the other half solid. When the speeches are concluded, the officials assigned to the taking of the votes give each juror two ballot balls, one pierced and one solid.[5] This is done in full view of the rival litigants, to secure that no one shall receive two pierced or two solid balls. Then the official designated for the purpose takes away the jurors' staves, in return for which each one as he records his vote receives a brass voucher marked with the numeral 3 (because he gets three



VI. 5—JURYMAN'S BALLOT
Each juror received two ballots, marked so as to indicate plaintiff and defendant. One ballot he cast into the voting urn, the other into a discard-urn

*[In ordinary suits, fixed allowances of water (i. e. of time as measured by the water-clock) were given for each speech, and the time occupied in the reading of affidavits, etc., was not included in the allowances, so that the water-clock was stopped while they were read. In more important cases a certain portion of the day was allotted to either side, without allowance for the time occupied by reading documents.]

obols when he gives it up). This is to ensure that all shall vote; since no one can get a voucher unless he votes. Two urns, one of brass and the other of wood, stand in the court, in distinct spots so that no one may surreptitiously insert ballot balls; in these the jurors record their votes. The brazen urn is for effective votes,* the wooden for unused votes; and the brazen urn has a lid pierced so as to take only one ballot ball, in order that no one may put in two at a time.

"When the jurors are about to vote, the crier demands first whether the litigants enter a protest against any of the evidence; for no protest can be received after the voting has begun. Then he proclaims again, 'The pierced ballot for the plaintiff, the solid for the defendant'; and the juror, taking his two ballot balls from the stand, with his hand closed over the stem so as not to show either the pierced or the solid ballot to the litigants, casts the one which is to count into the brazen urn, and the other into the wooden urn.

"Ch. 69. [*Announcing the Judgment.*] When the jurors have voted, the attendants take the urn containing the effective votes and discharge them on to a reckoning board having as many cavities as there are ballot balls, so that the effective votes, whether pierced or solid, may be plainly displayed and easily counted. Then the officials assigned to the taking of the votes tell them off on the board, the solid in one place and the pierced in another, and the crier announces the numbers of the votes, the pierced ballots being for the prosecutor and the solid for the defendant. Whichever has the majority is victorious; but if the votes are equal the verdict is for the defendant. Then, if damages have to be awarded, they vote again in the same way, first returning their pay-vouchers and receiving back their staves. Half a gallon of water is allowed to each party for the discussion of the damages. Finally, when all has been completed in accordance with the law, the jurors receive their pay in the order assigned by the lot."

*[i. e. those which record the juror's actual vote. Each juror receives two ballots, and uses one (pierced or solid according as he votes for the plaintiff or the defendant) to record his vote, and throws the other away.]

3. *Jury Procedure*

Jury-trial, as thus organized, was much more than our modern expedient for determining private claims and ordinary criminal charges. It was also, in effect, a chief engine for controlling the government. In a variety of ways, unknown to modern States, almost any issue of politics or administration or civic duty could under the Athenian constitution be submitted to a jury-trial; and any citizen could in virtually any case institute such a proceeding. Except during holiday periods or military operations, these jury-courts with their thousands of jurors were in almost constant session. Under Pericles, the practice of compensating jurors with a fee was introduced, and in the ensuing century a willing citizen might almost rely upon jury service for a regular income. The reproach of litigiousness, often levelled at the Athenians, may have been unjust, in view of all the circumstances. But trial by mass-jury was certainly a most prominent feature of their civic life. In Aristophanes' comedy of the "Clouds", a visitor in the clouds, when pointed out the city of Athens on the map, replies, "I don't believe it, for I see no juries sitting".

No contemporary eye-witness account of an Athenian jury-trial is extant. The trial-scene in Aristophanes is too obviously exaggerated to be typical. But a fair impression of the ordinary trial-day may be gained from

VI. Greek Legal System

Lucian's clever skit entitled "The Double Indictment". The famous cosmopolite and wit, Lucian, beginning as an advocate, had first reached eminence in the ranks of Oratory; but then, changing his style, had cultivated the Dialogue. This style, hitherto reserved for the philosophers, he had used in a semi-dramatic form, as a vehicle of satire. Being reproached, first, by the orators, for deserting them, and then by the philosophers, for maltreating their literary prerogative, he revenged himself on both camps with this drama-dialogue, in which he represents himself as sued by both Oratory and Dialogue. The scene is a trial-day at Athens; Zeus, overwhelmed with the world's business, but stung by the complaints of the Athenians about the delays in litigation, has decided to allot a day to clearing up the court-calendar. So he orders his daughter Dike (Justice), with Hermes (as clerk) to go down to Athens for the purpose:[cc]

[*A Trial-Day in Athens.*] "*Zeus (to Hermes).* Fly down and proclaim that there will be a session of court under the following regulations: All who have entered suit are to come to the Areopagus today; at that place Justice is to empanel juries for them out of the entire body of Athenians, the number of jurymen to depend upon the penalty involved; and if anyone thinks that his hearing has been unjust, he is to be allowed to appeal to me and have the case tried afresh, just as if it had not been tried at all. (To Justice) Daughter, take your place beside the Dread Goddesses [the Eumenides], empanel the juries and supervise the trials

3. *Jury Procedure*

"*Hermes.* Oyez, oyez! Under the blessing of Heaven, we shall hold a session of court today, the seventh of the month Elaphebolion. All who have entered suits are to come to the Areopagus, where Justice will empanel the juries and be present in person at the trials. The jurors will be drawn from the entire body of Athenians; the pay will be three obols a case, and the number of jurors will be in accordance with the charge. All those who have entered suits but have died before they came to trial are to be sent back to earth by Aeacus. If anyone thinks he has had an unjust hearing, he is to appeal the case, and the appeal will be to Zeus.

"*The God Pan.* Heavens, what a hubbub! What a shout they raise, Justice, and how eagerly they are gathering at a run, dragging each other up the hill, straight for the Areopagus! Hermes, too, is here already; so busy yourselves with the cases, empanel your juries and give your verdicts as usual

"*Hermes.* Come, Justice, let's call them to the bar.

"*Justice.* Quite right. Indeed they are approaching in crowds, as you see, with a great noise, buzzing about the hilltop like wasps.

"*Athenian.* I've got you, curse you!

"*Second Athenian.* You are a blackmailer!

"*Third Athenian.* At last you are going to pay the penalty!

"*Fourth Athenian.* I will prove that you have committed horrible crimes!

"*Fifth Athenian.* Empanel my jury first!

"*Sixth Athenian.* Come to court with me, scoundrel!

"*Seventh Athenian.* Stop choking me!

"*Justice.* Do you know what we ought to do, Hermes? Let us put off the rest of the cases until tomorrow, and today let us provide only for those entered by professions or pursuits or sciences against men. Pass me up the writs of that description.

"*Hermes.* Intemperance *v.* the Academy, in re Polemo: kidnapping.

"*Justice.* Draw seven jurors.

"*Hermes.* Stoa *v.* Pleasure: alienation of affections—because Pleasure coaxed away her lover, Dionysius.

"*Justice.* Five will do.

"*Hermes.* High-living *v.* Virtue, in re Aristippus.

"*Justice.* Let five sit in this case too.

"*Hermes.* Banking *v.* Diogenes: absconding.

"*Justice.* Draw only three.

"*Hermes.* Painting *v.* Pyrrho: breach of contract.

"*Justice.* Let nine sit on jury.

"*Hermes.* Do you want us to provide juries for these two cases also, recorded yesterday against the public speaker?

"*Justice.* Let us finish up the cases of long-standing; these can go over until tomorrow for trial.

"*Hermes.* Why, these are of the same nature, and the complaint, although recent, is very like those for which we have already provided juries, so that it ought to be tried along with them.

"*Justice.* You appear to have been unduly influenced to make the request, Hermes. Let us make the drawing, however, since you wish; but only for these two cases; we have enough on the docket. Give me the writs.

"*Hermes.* Oratory *v.* the Syrian: neglect. Dialogue *v.* the same: maltreatment.

"*Justice.* Who is this man, the Syrian? His name is not recorded.

"*Hermes.* Empanel a jury for him as it stands in the writ—for the public speaker, the Syrian [i. e. Lucian]. There is nothing to hinder its being done anonymously.

"*Justice.* Look here, are we really to try cases from over the border here in Athens, on the Areopagus? They ought to have been tried on the other side of the Euphrates. However, draw eleven jurors, the same men to sit for both cases.

3. *Jury Procedure*

"*Hermes.* You are right, Justice, to avoid spending too much in jury-fees.

"*Justice.* Let the first jury sit, in the case of Intemperance *v.* the Academy. Fill the water-clock. Plead first, Intemperance Why does she hold her tongue and shake her head? Go to her and find out, Hermes.

"*Hermes.* She says that she cannot plead her case because her tongue is tied with drink and she is afraid of getting laughed at in court. She can hardly stand, as you see.

"*Justice.* Then let her have an advocate appear, one of these public pleaders. There are plenty of them ready to split their lungs for three obols!

"*Hermes.* But not one will care to espouse the cause of Intemperance, not openly, at any rate. However, this request of hers seems reasonable.

"*Justice.* What request?

"*Hermes.* 'The Academy', she says, 'is always ready to argue on both sides and trains herself to be able to speak eloquently both pro and con. Therefore let her plead first for me, and then after that she will plead for herself.'

"*Justice.* That is unprecedented. Nevertheless, make both speeches, Academy, since it is easy for you.

"*Academy.* Listen first, gentlemen of the jury, to the plea of Intemperance, as the water now runs for her.

"The poor creature has been treated with the greatest injustice by me, the Academy. She has been robbed of the only friendly and faithful slave she had, who thought none of her orders unbecoming, Polemo yonder, who used to go roistering through the middle of the square in broad day I have said about all that there is to say for Intemperance. Now I will speak for myself, and from this point let the water run for me.

"*Justice.* What in the world will she say in reply to that? Anyhow, pour in the same amount for her in turn.

"*Academy.* Heard casually, gentlemen of the jury, the plea which the advocate has made in behalf of Intemperance is quite plausible, but if you give an unprejudiced hearing to my plea also, you will find out that I have done her no wrong at all.

"This man Polemo, who, she says, is her servant, was not naturally bad or inclined to Intemperance, ... At length he abandoned her then and there, and took up with me, not because I either invited or constrained him, as this person says, but voluntarily, because he believed the conditions here were better. Please summon him now, that you may see how he has fared at my hands. He himself is grateful to me for it, as are also his relatives on his account.

"I have done. It is for you not to consider which of us it was better for him to associate with.

"*Justice.* Come, now, do not delay; cast your ballots and get up; others must have their hearing.

"*Hermes.* The Academy wins by all the votes but one.

"*Justice.* It is not at all surprising that there should be one man to vote for Intemperance. Take your seats, you who have drawn to hear Stoa *v.* Pleasure in re a lover. The clock is filled. You with the paint upon and the gaudy colors, make your plea now.

"*Stoa.* I am not unaware, gentlemen of the jury, that I shall have to speak against an attractive opponent;

"This is all I have to say, for I am not at all fond of long speeches. But if she should consent to let me put questions and to give a brief reply to each, it would very soon be evident that she amounts to nothing. However, remember your oath and vote in accordance with it now, putting no faith in Epicurus, who says that the gods take no note of what happens among us.

3. *Jury Procedure*

"*Justice.* Stand aside. Epicurus, speak for Pleasure.

"*Epicurus.* I shall not address you at length, gentlemen of the jury, for I myself do not need many words.

"If Pleasure had used charms or philtres to contrain Dionysius, whom Stoa claims to be her lover, to desert Stoa, and to centre his regard upon her, she might fairly have been held a sorceress and might have been found guilty of using undue influence upon the lovers of others.

"I have done. Cast your ballots with this understanding of the case.

"*Stoa.* No, no! Let me cross-question him a little.

"*Epicurus.* Put your questions; I will answer them.

"*Stoa.* Do you consider pain bad?

"*Epicurus.* Yes.

"*Stoa.* And pleasure good?

"*Epicurus.* Certainly.

"*Stoa.* Well, do you know the meaning of 'material' and 'immaterial', of 'approved' and 'disapproved'?

"*Epicurus.* Certainly.

"*Hermes.* Stoa, the jurors say they can't understand these dissyllabic questions, so be silent; they are voting.

"*Stoa.* I should have won if I had put him a question in the form of the 'third indemonstrable'.

"*Justice.* Who won?

"*Hermes.* Pleasure, unanimously.

"*Stoa.* I appeal to Zeus!

"*Justice.* Good luck to you! Hermes, call another case.

"*Hermes.* Virtue *v.* High-living, in re Aristippus. Let Aristippus appear in person.

"*Virtue.* I ought to speak first; I am Virtue, and Aristippus belongs to me, as his words and his deeds indicate.

"*High-living.* No, indeed; I ought to speak first; I am High-living, and the man is mine, as you can see from his garlands, his purple cloak and his perfumes.

"*Justice.* Do not wrangle; this case will stand over until Zeus decides the case of Dionysius, for this seems to be similar. Consequently, if Pleasure wins, High-living shall have Aristippus, but if Stoa prevails, he shall be adjudged to Virtue. So let others appear. Look here, though—these jurors are not to get the fee, for their case has not come to trial.

"*Hermes.* Then are they to have come up here for nothing, old as they are, and the hill so high?

"*Justice.* It will be enough if they get a third. Go your ways; don't be angry, you shall serve another day.

". Now call the speech-writer, the Syrian. After all, it was only recently that the writs were lodged against him, and there was no pressing need to have tried the cases now. However, since that point has been decided, take the suit of Oratory first. Heavens, what a crowd has come together for the hearing!

"*Hermes.* Naturally, Justice. The case is not stale, but new and unfamiliar, having been entered only yesterday, as you said, and they hope to hear Oratory and Dialogue bringing charges in turn and the Syrian defending himself against both; this has brought crowds to court. But do begin your speech, Oratory.

"*Oratory.* In the first place, men of Athens, I pray the gods and goddesses one and all that as much good will as I steadily entertain toward the city and toward all of you may be shown me by you in this case But not to prolong my introduction when the water has been running freely this long time, I will begin my complaint.

3. *Jury Procedure*

"When this man was a mere boy, gentlemen of the jury, still speaking with a foreign accent and I might almost say wearing a caftan in the Syrian style, I found him still wandering about in Ionia, not knowing what to do with himself; so I took him in hand and gave him an education. Then, after we were married, I got him irregularly registered among my own clansmen and made him a citizen, so that those who had failed to secure my hand in marriage choked with envy. Is he not, then, ungrateful and subject to punishment under the laws that concern desertion, inasmuch as he so disgracefully abandoned his lawful wife? I have finished, gentlemen of the jury. But I beg you, if he wishes to make his defence in my style of speaking, do not permit that

"*Hermes.* That is unreasonable. It is not possible, Oratory, for him, all by himself, to make his defence after Dialogue's manner. Let him make a speech as you did.

"*The Syrian* [*Lucian.*] Gentlemen of the jury, as my opponent was indignant at the thought of my using a long speech when I acquired my power of speaking from her, I shall not say much to you, but shall simply answer the main points of her complaint and then leave it to you to weigh the whole question. In all that she told about me she told the truth. She gave me an education and went abroad with me and had me enfranchized as a Greek, and on this account, at least, I am grateful to her for marrying me I could not stand this, and as I did not think it best to bring an action for divorce against her on the ground of adultery, I went to Dialogue, who lived near by, and requested him to take me in.

"This is the great injustice that I have done Oratory

"Though I have much to say, I will stop now. Cast your vote in accordance with your oath.

(*The votes are counted.*)

"*Justice.* Who is the winner?

"*Hermes.* The Syrian, with every vote but one.

"*Justice.* Very likely it was an orator-speaker who cast the vote against him. Let Dialogue plead before the same jury. (*To the jurors*) Wait, and you shall get double pay for the two cases.

"*Dialogue.* For my part, gentlemen of the jury, I should prefer not to make you a long speech, but to discuss the matter a little at a time, as is my wont. Nevertheless I will make my complaint in the way that is customary in courts of law, although I am completely uninformed and inexperienced in such matters. Please consider this my introduction.

"The wrongs done me and the insults put upon me by this man are these Have I not been dreadfully maltreated, when I no longer occupy my proper role but play the comedian and the buffoon and act out extraordinary plots for him?

"*Hermes.* What are you going to say to this, Master Syrian?

"*The Syrian* [*Lucian.*] Gentlemen of the jury, the suit that I am contesting now before you is unexpected. In fact, I should have looked for anything else in the world sooner than that Dialogue should say such things about me

"I have made the best defence that I can. Please bring the same verdict as before.

(*The votes are counted.*)

"*Hermes.* Well, well! You win with ten votes! The same one who voted against you before will not vote with the rest even now. Without doubt it is a habit, and that man always casts the ballot [for guilty] that has a hole in it. I hope he will keep on envying men of standing. Well, go your ways, and good luck to you. Tomorrow we will try the rest of the cases."

This unique institution of a bench of lay-citizens—a virtual mass-meeting—doing justice as judges both of law and fact, naturally raises a question as to their compe-

tency. How did law and justice fare at their hands? A learned editor of Demosthenes' orations has offered some shrewd comments, in answer:[d]

"With respect to the ability of the Athenian jurors to perform the judicial duty imposed on them, there is a good deal to be said on both sides. That they should perform it in a thoroughly business-like manner, or so as to fulfill what may have been Solon's conception of the trust confided to them, was hardly in the nature of things. They had to administer justice according to the written law, and of course to interpret that law; where there was no written statute, they were bound to decide according to the best of their ability; that is, in the absence of any express legislative provision, they were required to apply the general principles of law and justice to the case before them. They were also sole judges of the facts of every case. They were persons of no legal education or learning; taken at haphazard from the whole body of citizens, and mostly belonging to the lowest and poorest class of them.—On the other hand, the Athenians were naturally the quickest and cleverest people in the world. Their wits were sharpened by the habit of attending the theatres and public assemblies, of taking an active part in important debates, and hearing the most splendid orators. There was so much litigation at Athens, that they were constantly either engaged as jurors, or present as spectators in courts of law. Cases of all varieties were brought before them, involving difficult questions concerning pedigree and succession, marital and filial right, mercantile and mining contracts, besides assaults, trespasses, frauds, and criminal charges of every description. Then they lived an out-of-door life, constantly meeting in the market-place or elsewhere, hearing foreign news, discussing politics, etc. All this was a sort of education, and if not the best, still it fitted the people in some measure for the performance of the duties we are speaking of

"But would it have been better for the Athenians, if they had had official and permanent judges to direct and control the jury; to

point out the fallacies, the falsehoods, the quibbles and artifices of the speakers; and to decide the various points of law which arose? Such a thing would not only have been incompatible with the spirit of the constitution, but would not, in my opinion, have promoted the ends of justice. Under the existing system, a sort of rough justice was done by the Athenian jurors, and it was owing to their freedom, and to the free government of the state. Under a different system, they might have had no justice at all I would rather try an important case before a thousand independent jurors without a judge, than before a pliant jury with a judge. We owe all our liberties to the circumstance that English juries occasionally displayed a little English obstinacy."

Whatever inferences we may make as to the practical merits of this jury-justice, its distinctive constitutional feature was unique, in that this popular jury was the all-powerful tribunal of law and justice. Aristotle records his opinion that in his day (B. C. 325), "the democracy has made itself master of everything, and administers everything by its votes in the assembly and in the law-courts, in which it holds the supreme power." And a modern critic emphasizes this diagnosis in terms significant to a lawyer:[e]

"The real power of the Athenian demos, as he himself well knew, lay in the courts of law. There was his throne, and there his sceptre. There he found compliment, court, and adulations rained upon him so thick, that his imagination began at last to believe what his flatterers assured him, that he was a god, and not a man. And a god in some sense he was; for to no earthly tribunal lay there an appeal from him; his person was irresponsible, his decrees irreversi-

ble; and if ever there was a despotism complete in itself, 'pure, unsophisticated, dephlegmated, defecated' despotism, it was that of an Athenian court of judicature."

Whatever may have been the advantage for justice and equity in particular cases, because of the flexibility of the Athenian jury's power, still on the whole the result of its freedom was to dilute the community's respect for settled rules, and to prevent inevitably the development of a genuine and enduring system of law. And this effect was due mainly to (1) the lack of a body of professional judges, declaring the law to the triers of fact; (2) the size of the juries, identical more or less with the body of citizen-legislators at large; and (3) the lack of any other independent body, voicing the settled law, to be a check upon the citizens either as jurors or as legislators.

The result upon Athenian law has been well characterized by a modern historian, speaking of the period of Socrates' trial:[f]

"The sole guardian of the laws was now the popular courts The jury courts at Athens were so empanelled (by the drawing by lot of a large group locally distributed) that the justice emanating from them was the justice that animated at the moment the Athenian people. The unlikeness in deciding like cases which is the essence of injustice must, in these circumstances, have vitiated legal decisions, if a national familiarity with law had not been cultivated and sustained by the democratic judicial system. It also served to steady the action of the courts that, as a result of discussions carried on for two centuries, citizens had come to possess

a valuable common stock of juridical ideas. Except for the uniqueness of their legal education, equity must have broken with strict law altogether Neither in legal records nor in the training, learning, and experience of those who held court was there much hope of previous decisions making themselves felt in determining verdicts Precedents had no legal standing in Attic courts. They could not be invoked authoritatively to restrain the predatory instincts of the jurors when the Athenian people, as in B. C. 410–405, had become embittered against its citizens of wealth and standing, by injury, suspicion and misery.

"The consequences were, accordingly, deplorable. A set of acrid politicians and sycophants, headed by Epigenes, Demophantus, and Cleigenes, encompassed the exile, disfranchisement, or judicial murder of many persons. Others they blackmailed by threats of indictment. It was in this Athens that Plato became of age to consider the plan and purpose of his life, and of it he was probably thinking when long afterwards he wrote that there was in it 'but a very small remnant of honest followers of wisdom.' These, he thought, 'might be compared to a man who has fallen among wild beasts: he will not be one of them, but he is too unaided to make head against them; and before he can do any good to society or his friends, he will be overwhelmed and perish miserably'."

4. The procedure of civil litigation in Greece was elaborately developed; although its details have had to be reconstructed, by the labors of scholars, from the copious allusions in the extant orations and inscriptions; for no treatises are extant (nor perhaps ever existed), and the original records of litigation that survive are few.

The most interesting and nearly complete one is the record of a lawsuit about B. C. 100, in the island of Cos.

4. *Civil Litigation*

This was an action for money brought by the heirs of a banker named Pausimachos. It seems that Pausimachos and Hippocrates, two bankers of Cos, had loaned a large sum of money to the city of Calymna; the loan having actually been underwritten by other citizens of Cos. Hippocrates, one of the lenders, had died; his share of the loan had been one-fifth; and Pausimachos, whose share of the loan was four-fifths, had also died. But, in the meantime, certain payments had been made by the city-debtor to the heirs of Hippocrates. The heirs of Pausimachos now claimed from the city of Calymna the payment of their share, on the ground that the former payments should not be credited, because the loan was not a joint loan, but a several one, and the payments to the heirs of Hippocrates could not be credited against the share of the heirs of Pausimachos. The dispute having been referred, by arbitration, to the disinterested city of Cnidos, the trial was to take place before the popular jury of Cnidos, which in this case numbered two hundred and four jurymen. The following is the record of the trial, setting forth the procedure as determined by the councillors and assembly of Cnidos, and then the judgment:[g]

[*Civil Action at Cnidos.*] "[1] [*Rules of Procedure.*] The councillors of Cnidos will administer the oath to the jurors as follows: 'I swear by Jupiter, by the Lucian Apollo, and by the Earth, that I will decide in the case now at issue between the parties, according

to what shall seem to me most just. I will not decide merely on the word of any one witness, if that witness does not appear to me to speak the truth. I have not received any gift in connection with this suit, neither I nor any one for me, man or woman, directly or indirectly. May I prosper if I keep my oath, but may disaster strike me if I perjure myself!'

"[2] The city ordinances, the summonses, and all other documents that it may be necessary to withdraw from public custody shall be presented to the court by the respective parties but sealed with the seal of the respective cities, in such form as the respective cities shall determine by law. They shall be delivered by the parties to the councillors of Cnidos, and the latter, after breaking the seals, shall take out the documents and deliver them to each of the parties upon the opening of court. Each of the parties shall produce the depositions before the trial opens.

"[3] The time for delivery of speeches shall be limited to eighteen clock-measures for each of the parties for the first speech and to ten clock-measures for the second. Each of the parties may bring not more than four attorneys. The attorneys may also be witnesses.

"[4] The city ordinances, the summonses, the written formula for the suit, and all other documents taken from public custody shall be read by the clerk furnished by the respective parties, and also the depositions, and during this reading the clock shall be stopped.

"[5] As to witnesses, those who are able to be present in person shall give testimony personally before the court; those who are not able to be present in person shall give their testimony to an officer appointed in the respective cities on the 24th day of the month known as Batromios at Calymna and as Caphisios at Cos, in the presence of the opponents, if the latter wish to be present. Witnesses before testifying shall take the oath prescribed by law, viz. that they will tell the truth and that they are unable to attend the

trial. The depositions thus taken before such officers shall be sealed by the latter under public seal, and countersealed by the respective parties, if they desire. Copies of these depositions shall be promptly delivered to the parties by the officers. Copies of all depositions received at Cos shall be sent by the officers, some of them sealed under public seal, and others not sealed, to the officials of Calymna within twenty days after taking the deposition, and similarly the officers of Calymna shall send copies of all depositions taken before them at Calymna, some sealed under public seal and others not sealed, to the officers of Cos, within twenty days after taking the deposition; and besides, the said officers for such depositions shall do all that ought to be done by the officers of Cos. Citizens of Calymna who go to Cos to be present at these inquiries shall receive from the city of Cos a safe-conduct. The councillors of Cos shall accord to the respective parties at the trial the right to put questions to the witnesses separately, after the opening speeches. The parties may interrogate the witnesses on matters relevant to this lawsuit, but not on other matters.

"[6] If the parties do not finish respectively their speeches within the time limited as above, they are not to speak beyond the moment when the water is entirely emptied from the clock. Upon the completion of the speeches, the councillors shall distribute immediately the voting ballots.

"[7] [*The Claim.*] Aristodamos, son of Aglaostratos children of Diagoras [son of Pausimachos] against in the presence of the councillors of Cnidos claims as follows: making first a deduction on the loan of Pausimachos and Hippocrates for the money paid in the mayoralty of Alkimachos, and also of the talent which the Calymnians claim was paid to them by Pausimachos and Cleomedes; making deduction also for the precious vessels and the forests [given as security for the loan, and realized on by sale] and of the fifth part of the payments which the Calymnians claim to have made to Pausimachos and to Cleomedes

[son of Hippocrates], pursuant to the agreement which they claim to have entered into with Pausimachos and Cleomedes, the whole of which, however, is disputed by the heirs of Cleomedes (and from all these payments must be omitted the part applicable to the loan of Hippocrates); and deducting finally the larger sum which the Calymnians claim to have paid to Cleomedes, and also all other payments mentioned in the communication sent by the city of Cos to the city of Calymna, and received by the agents who had gone to Cos, viz. [giving five names], in which we have written down these payments, crediting them to the assets of the heirs of Hippocrates in the accounting for sums due to Hippocrates by the Calymnians, from and after the month Caphisios of the year when Hermonax was in office:

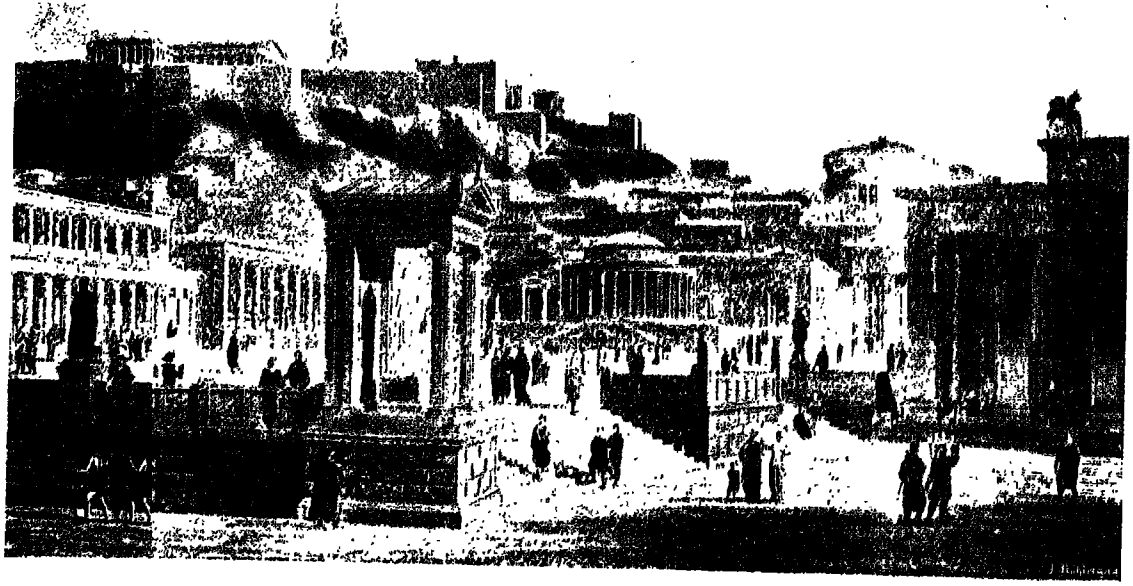
"We claim the balance of this account, reckoned with interest for the share belonging to us. But the Calymnians refuse to pay it, claiming that they have already paid it with interest to Cleomedes, son of Hippocrates, and to Cleophantos, son of Cleomedes.

"Total sum claimed by us: thirty talents [about $36,000].

"[8] [*Judgment.*] A vote of judgment being taken, it appeared from the ballots that there were 78 in favor of the claim and 126 against it. Done the 17th day of the month of Elaphrios in the Mayoralty of Alkimachos.

"Attorneys, for the children of Diagoras, Philinos, son of Diocles of Cos; and for the city of Calymna, Hecatonymos, son of Prytanias of Myletus, Exakestos, son of Alkinoos of Calymna, Aratophantos, son of Aristolas of Calymna."

5. The places at which trials were held varied for different classes of cases and at different periods. At Athens, the Agora,[6] or market-place, the Areopagus Hill, and the Pnyx Hill were the chief places of interest for law and politics.



VI. 6—The Market-Place at Athens

In this Agora the Assembly often was held, and the smaller trial-courts met in various porticos surrounding it

5. *Places of Trial*

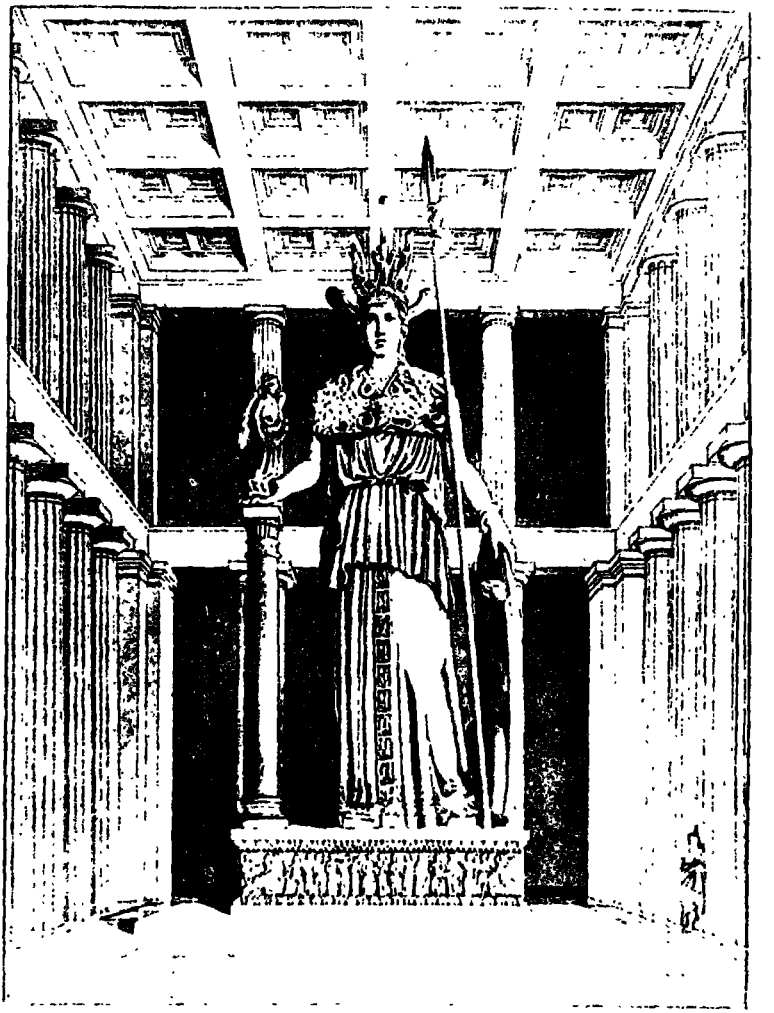
Even at Athens, the most highly developed of the city-states, in its classic period, justice though secular had not reached that advanced stage of modern nations in which justice is sharply separated from general politics. Below, in the market-place, were held occasionally the meetings of the popular Assembly, or Ecclesia, and the Assembly not only enacted laws but sometimes tried political offences. This papyrus,[7] for example, discovered only twenty years ago, is a fragmentary passage from the historian Apollodorus, describing a trial in the market-place. It was the celebrated prosecution of Phidias for embezzling some of the ivory that had been entrusted to him for making the world-famous statue of Athena. The statue was composed all of gold and ivory.[8] Phidias had received the order to make this for the Parthenon Temple. Pericles, the great statesman who beautified Athens architecturally, had given Phidias a free hand in the purchase of materials. But a jealous workman laid an information for embezzlement. Pericles' political enemies pushed the prosecution zealously; and though the scandalous charge proved groundless, it ended the great sculptor's career at Athens.

But usually the Assembly met on the hill called Pnyx; it was there that Pericles, and other famous statesmen, moved the assemblies with their eloquence; and it was



VI. 7—The Trial of Phidias

This fragment of a papyrus contains an account of the trial of Phidias for embezzling the ivory furnished him for the statue of Athena



VI. 8—Statue of Athena
This statue, in the Parthenon, was made by Phidias the sculptor, and his trial was for embezzling some of the ivory

there in the open air, under the warm blue Greek sky, before the massed multitudes, every citizen being a legislator, that the great art of political oratory was first developed in the world's history.[9]

Another hill, the Areopagus, was sacred to the legend of Orestes, and in the earlier period this was the special place for certain trials for homicide. In the legend, Orestes had deliberately killed his adulterous mother, and was brought to trial; the Furies or Avengers were the prosecutors: the goddess Athena presided: she had frankly declared herself ready to cast the deciding vote in his favor. However, the jurors acquitted him;[10] and Orestes, in gratitude, then erected a memorial altar to



VI. 10—THE TRIAL OF ORESTES
The jurymen are seen on the right, casting their ballots



VI. 9—Pericles Addressing the Assembly on the Pnyx

justice; and here met the once supreme tribunal of the Areopagus, or Senate of One Hundred, as ordained in the goddess Athena's words: "This court, majestic, incorruptible, the sleepless watcher of my land I set."

It was on the Areopagus that Paul the Apostle made his memorable address to the people of Athens, "O men of Athens, God hath made of one blood all nations that dwell upon the earth". And it was before the Court of the Areopagus that the celebrated lawsuit is said to have been brought, related in the anecdote of the contingent fee of Protagoras, the teacher of oratory. He made a contract with his pupil Evalthus that his fee should be payable when the young man won his first lawsuit. After a while the lessons ceased and the teacher pronounced him competent, but the young man insisted that he was not. So the teacher sued. While waiting for trial, the teacher said to his friends: "I win, either way; for if the judgment is for me, he must pay; but if it is for him, he has won his first suit and under the contract he must therefore pay." But the young man said to his friends, "I win, either way; for if the judgment is for me, I am not liable; and if the judgment is against me, I have not yet won my first suit." The judges, it is said, were so puzzled by this logical dilemma, that they adjourned the case for a hundred years.

VI. Greek Legal System

6. In the Greek administration of law, the emphasis was less on the strict rules of law than on the general justice of the case. This was inevitable, with a purely democratic judgment rendered alike on law and facts by a multitudinous popular jury without a presiding judge and with no appeal of law. It had several marked consequences. For one thing, it led to the development of forensic oratory.

It is in Greece that this art dawns upon the world. The speeches of the Greek orators in law cases have been studied by successive generations of lawyers in every age and in every country. Indeed, the greater part of the attainable knowledge of Greek law and justice is founded on the texts of these orations that have been preserved. The famous names that come down to us in Greek justice are not the names of judges or jurisconsults, as in the Hebrew and the Roman, the English, the Japanese and the Mohammedan legal systems; but the names of orators. The very term used for an advocate was not lawyer, or jurist, but orator, or "speech-writer"; and the spirit of his whole argument may be inferred from the circumstance that in the very first sentence of the speeches of Lysias and other orators we usually find the identical apostrophe, familiar to our modern courts, "Gentlemen of the jury!" (ὦ ἄνδρες δικασταί).

6. *Advocates*

It was theoretically expected at Athens that a citizen should plead his own cause; and the "speech-writer" was the person who composed the speech for him. But litigation was popular and multifarious; and a professional class of speech-makers naturally developed. As time went on, it became allowable for the advocate to deliver a speech personally in behalf of the client, on one pretext or another (though not for a fee). But Lysias, who in his day (say B. C. 440-360) was among the most eminent advocates of his class, practised almost exclusively by writing, not delivering, the speeches. Of this extraordinary man, who is credited with some two hundred and fifty orations during his career at the bar, tradition has it that he lost only two cases. An anecdote is told of him that a client once came back to Lysias, dissatisfied with the speech that had been written for him to deliver: "When I read it over the first time", said the client, "it seemed to me admirable; but after my second and third rehearsals, it sounded tame and feeble". "You must remember", replied Lysias, "that the court will hear it only once!" A saying of Lysias which has verity for all time was this: "The laws will be no better than the law-makers".

The Athenian practice of popular justice naturally permitted and encouraged the advocates to employ all the ingenious arts of sophistry and emotional appeal which

would sway a popular court. The rigid control, by instructions of law and review on appeal, which the judge in our own modern system is authorized to impose on such arts, so as to keep the verdict within the bounds of law and fact, were unknown in that system. The trial of Phryne comes down to us as a celebrated illustration.[11] The orator here was Hyperides, a pupil and contemporary of Demosthenes, and some of his speeches have been pronounced to surpass Demosthenes'. Phryne was a celebrated woman of pleasure, accused of impiety in profaning the Eleusinian mysteries; the trial took place about B. C. 340. As the cause progressed, and a verdict of guilty seemed to impend, Hyperides drew the accused into full sight before the tribunal, tore aside her tunic, and bared her breasts (says Athenaeus) "and in a passionate appeal to the jurors invoked their religious scruples to have pity on this priestess of Aphrodite". Phryne was acquitted; but a law is said to have been passed that thenceforth the accused should not be placed in the sight of the jurors at the trial.

Demosthenes may be termed the Daniel Webster of Athens, for although political history claims him as a statesman, yet in professional forensic oratory he holds also a foremost place. A brief passage from one of his lawsuit-speeches may be quoted here, not as exhibiting



VI. 11—The Trial of Phryne
She was defended by the orator Hyperides, who was ranked with Demosthenes by repute

the eloquence which his fame imports, but as illustrating the advanced technique of the Greek advocate in handling a mixed issue of law and fact before a jury.[12] The case was that of Darius v. Dionysodorus; the plaintiff demanded repayment of a loan of 3000 drachmas, made for a voyage from Athens to Egypt and return, with a cargo of grain, payable with interest on safe return of the ship to Athens. (It will be remembered that the speech, though written by Demosthenes, reads in the first person of the party-plaintiff):[h]

"I am a partner in this loan, gentlemen of the jury. We who have engaged in maritime trade, and put our money in the hands of other people, know very well that the borrower has the advantage over us in every respect. He receives our hard cash without any mistake, and leaves us a bit of writing and a small scrap of paper that cost two farthings, containing his covenant to do what is right. We do not promise to advance our money, but advance it to the borrower immediately. On what then do we rely, and what security do we get when we part with our money? We rely on you, gentlemen of the jury, and on your laws, which declare that whatever agreement a man enters into voluntarily with another shall be valid.

"It seems to me however, that neither laws nor agreements are of any use, if a person who receives money is not honest in his principles, and does not either fear or respect the rights of the lender. Dionysodorus the defendant does neither of these, but has arrived at such a pitch of audacity, that after borrowing three thousand drachmas from us upon his ship, on the condition that his ship should return to Athens, and when we ought to have got back our money in the season of last year, he carried his ship to Rhodes, unloaded his



VI. 12—Demosthenes

cargo there and sold it in violation of the agreement and of your laws, from Rhodes again he despatched the ship to Egypt, and from thence to Rhodes, and even to this day he has never paid us who lent him our money at Athens, or produced to us our security. He has now for two years been making use of our funds, keeping the loan and the trade and the ship that was mortgaged to us, and notwithstanding this he has come into court, with the intention, I presume, of mulcting us with the sixth part of the damages, and putting us in the lodging, besides cheating us out of our money. I therefore, men of Athens, beseech and implore you all to give me redress, if you think I have been wronged. Let me first explain to you how the loan was contracted: that will best enable you to follow the case.

"This Dionysodorus, men of Athens, and his partner Parmeniscus, came to us last year in the month of Metageitnion, and said they wanted to borrow money on their ship, on the terms that she should sail to Egypt and from Egypt to Rhodes or Athens, and they engaged to pay interest to either of those ports, as the case might be. We replied, gentlemen of the jury, that we would not lend to any other port than to Athens, and so they agree to return here, and these terms being arranged, they borrow three thousand drachmas from us upon the ship, on the voyage out and home, and entered into a written agreement to that effect. In the agreement Pamphilus, who is here in court, was set down as the lender: I however, though not named, lent the money jointly with him. And first he shall read you the agreement

"In pursuance of this agreement, gentlemen of the jury, Dionysodorus the defendant and his partner Parmeniscus sent off the ship from Athens to Egypt. And Parmeniscus sailed with the ship; Dionysodorus stayed at Athens. For you must know, gentlemen of the jury, these men were agents and confederates of Cleomenes, the governor of Egypt, who, from the time that he received the government, has done immense mischief to your state, and still more to the rest of the Greeks, by buying up corn for resale and keeping it

at his own price; and these men have been acting in league with him. It was done in this way. Some of them shipped off cargoes from Egypt, while others went out in the trading vessels, and others stayed at Athens and disposed of the consignments. Then those who stayed here sent letters to those abroad advising them of the state of the market, so that, if corn were dear with you, they might bring it here; if it became cheaper, they might sail to some other port. It was chiefly owing to such letters and confederacies, gentlemen of the jury, that the price of corn was raised.

"Well; when these men sent off this ship from Athens, they left the price of corn here pretty high; and therefore they submitted to the clause in the agreement, binding them to sail back to Athens and to no other port. Afterwards however, gentlemen of the jury, when the Sicilian vessels had arrived, and the price of corn was falling, and their ship had got to Egypt, the defendant instantly despatches a person to Rhodes to inform his partner Parmeniscus of the state of things here, knowing perfectly well that his ship would be obliged to touch at Rhodes. The result was that Parmeniscus, the defendant's partner, having received his letter of advice, and learned the state of the corn-market at Athens, unships his corn at Rhodes and sells it there! And thus, gentlemen of the jury, they acted in defiance of the agreement, and of the penalty to which they had bound themselves in case of any breach of the agreement, and in defiance also of your laws, which require ship-owners and merchants to sail to the port which they have agreed to, and subject them, in default of their so doing, to the severest punishments.

.

"You have heard, gentlemen of the jury, what Dionysodorus has done. During the recital of these facts you must have been wondering, I take it, at his audacity, and what he could possibly have relied upon in coming to court. Audacity it is indeed, when a man, having borrowed money from the port of Athens, and having made an express agreement that his ship shall return to your port, or

else that he will pay double the amount, neither has brought his ship home to the Piraeus, nor pays the lenders their money; and when he has landed his cargo at Rhodes and sold it there, and notwithstanding all these acts he dares to look you in the face!

"Now hear what he has to say to this. He says that his ship was disabled on her voyage from Egypt, and that he was therefore compelled both to touch at Rhodes and to unlade his corn there. And for proof he alleges, that he chartered vessels from Rhodes and shipped off some of his goods to Athens. That is one part of his defence. Another is this—He says that certain other creditors have consented at his request to take interest as far as Rhodes only, and it would be hard if we did not consent to the same terms as they did. Thirdly, he says, that the agreement binds him to pay the money if the ship arrives safe, and that the ship has not arrived safe in Piraeus. To each of these pleas, gentlemen of the jury, hear my just reply.

"In the first place, when he says that the ship was disabled, I think his falsehood is apparent to you all. For, if the ship had really sustained this disaster, she would neither have got safe to Rhodes nor have been fit for sea afterwards. She appears however to have got safe to Rhodes, and again to have been despatched from Rhodes to Egypt, and at this very time She is sailing everywhere except to Athens. Is it not monstrous that, when he has to bring the ship home to the Athenian port, he says She was disabled, but, when he wants to unlade his corn at Rhodes, then the same ship appears to be seaworthy?

"Upon these points I have said enough. With respect to the creditors who, they say, have consented to receive from them the interest to Rhodes, we have nothing to do with that. If any man has forgiven you any part of a debt, he that you have made terms with has sustained no wrong. We however have not remitted anything to you, Dionysodorus, nor consented to your touching at Rhodes. We consider the agreement to be in force, anything to the

contrary notwithstanding. What says the agreement, and where does it require you to sail? From Athens to Egypt and from Egypt to Athens; in default of so doing, it binds you to pay double the amount. If you have performed this condition, you have done no wrong; if you have not performed it, and not brought your ship back to Athens, you are liable to the penalty in the agreement If certain persons have excused you anything, and consented for some reason or other to take interest as far as Rhodes, does that exempt you from liability to us, with whom you have committed a breach of your agreement, in landing at Rhodes? I should hardly think so. The jury are not now deciding upon terms consented to by others, but upon a contract entered into by you yourself with us. Don't listen then to this man, when he attempts to cajole you, and cites his transactions with other creditors as examples for us; but refer him to the agreement, and to the rights which spring out of the agreement.

"The defendant relies finally upon the fact that the agreement only requires him to pay the debt if the ship arrives safe Whose fault is it, gentlemen of the jury, that the ship has not come safe to Piraeus? Are we to blame, who lent our money expressly on a voyage to Egypt and to Athens, or Dionysodorus and his partner, who, having borrowed upon these terms, that the ship should return to Athens, took the ship to Rhodes notwithstanding? That they did this voluntarily and not of necessity is clear from many circumstances. For, if the occurrence was really involuntary and the ship was disabled, surely, after they had repaired the ship, they would not have let her for a voyage to other ports, but would have sent her off to Athens, and made amends for the involuntary accident

"The facts of the case then, are thus brief and easy to be remembered. We lent to this Dionysodorus and his partner three thousand drachmas on a voyage from Athens to Egypt and back; we have not received payment either of principal or interest; they have

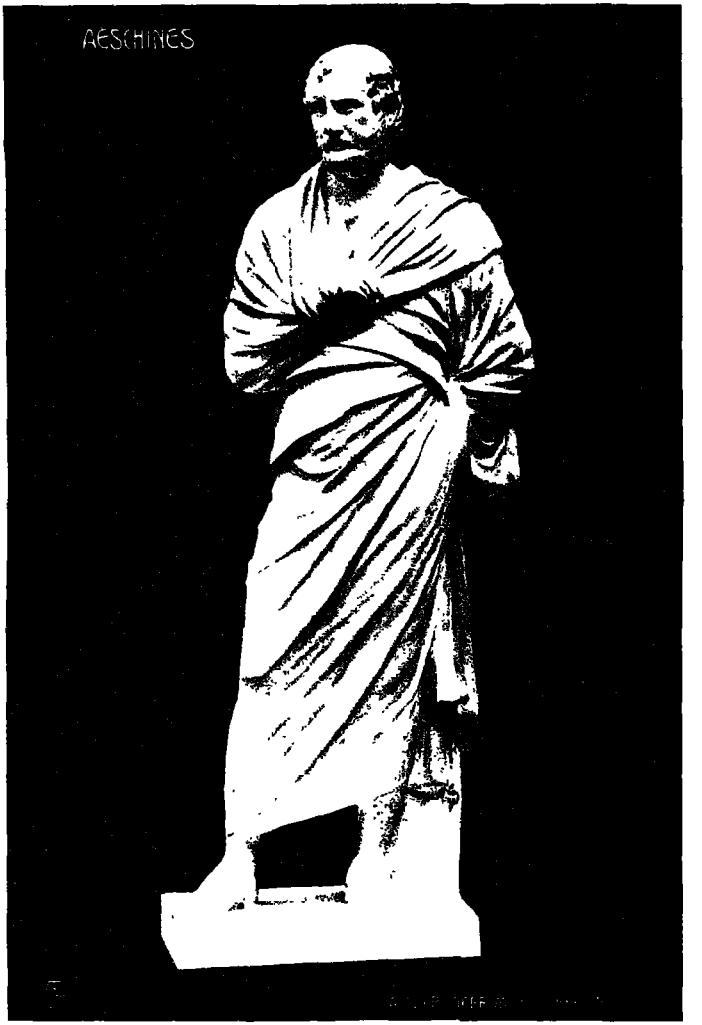
kept possession and had the use of our money for two years; they have not even to this day brought home their ship to your port or delivered it to us. The agreement declares that, if they do not deliver to us the ship, they shall pay double the amount, and that the debt may be recovered from either one or both of them. These are the grounds upon which we have come into court, seeking to recover our money through your assistance, as we cannot get it from these men themselves. Such is our case, gentlemen of the jury

"And besides, men of Athens, do not forget that, though you are sitting in judgment only upon one cause, you are making law for the whole port of Athens; and a large number of commercial people are standing by, to see how you decide this question. For if you hold that contracts and mutual engagements ought to be enforced, and treat with rigour those who violate them, the lenders of money will be more ready to part with what they have, and by that means the trade of your port will be increased. But if ship-owners, after entering into written contracts to sail to Athens, shall be at liberty to carry the ship to other ports under the plea that she has been disabled, and under any other such pretence as these which Dionysodorus sets up, and to apportion the interest according to the length of the voyage which they say they have performed, instead of paying it according to the terms of their agreement, there will be nothing to prevent all contracts of loan being dissolved. For who will like to part with his money, when he sees that written agreements are of no force, while effect is given to pleas like the present, and the excuses of wrong-doers prevail over right and justice? Never allow such a thing, gentlemen of the jury! It is not expedient either for the mass of the people or for the mercantile class, who are a most useful body of men both to the public at large and to those who have dealings with them, and therefore you ought to be careful of their interests."

Might not this speech, in style and construction, have served equally well for a jury of today trying the same issue?

Perhaps the case most celebrated for the eloquence of the orators, in Athenian justice, was the prosecution of Ctesiphon by Aeschines. Aeschines,[13] who spoke as prosecutor, and rivalled Demosthenes in fame, charged Ctesiphon with illegally proposing that the Assembly should award to Demosthenes a gold crown in recognition of Demosthenes' patriotic services against the Macedonians. The trial was had probably before a jury of one thousand. Demosthenes, though nominally the defender of Ctesiphon, was virtually defending himself and his whole political career. Immense crowds from all Attica thronged into the city to hear the famous rivals. And then was delivered that oration which is handed down, by universal opinion, as the greatest speech of the greatest orator in the ancient world,—Demosthenes' Oration on the Crown. History records its overwhelming success, and the verdict that vindicated him drove his prosecutor into exile.

7. The legislation of the Greek city-states, though copious, has come down to us only in scanty scattered fragments,—sometimes in the original stone inscriptions, sometimes in quotations of laws in the orators' speeches.



VI. 13—AESCHINES
He was the advocate for the prosecution, in the trial which made Demosthenes virtually the defendant

7. *Legislation*



VI. 14—THE THRONE OF MINOS

The earliest of the Greek communities, known to us in definite records, was the large island of Crete, lying in the Mediterranean, on the way from Egypt; and here tradition places the home of Minos, the first Greek law-giver. Minos' date is perhaps 1600 years before Christ; and the throne on which he sat in the royal palace at Knossos, 3500 years ago, can now be seen by the traveler replaced in its original spot.[14] Minos, in Greek mythology, received his laws from Zeus, and later plays the part of one of the three judges of souls in Hades.

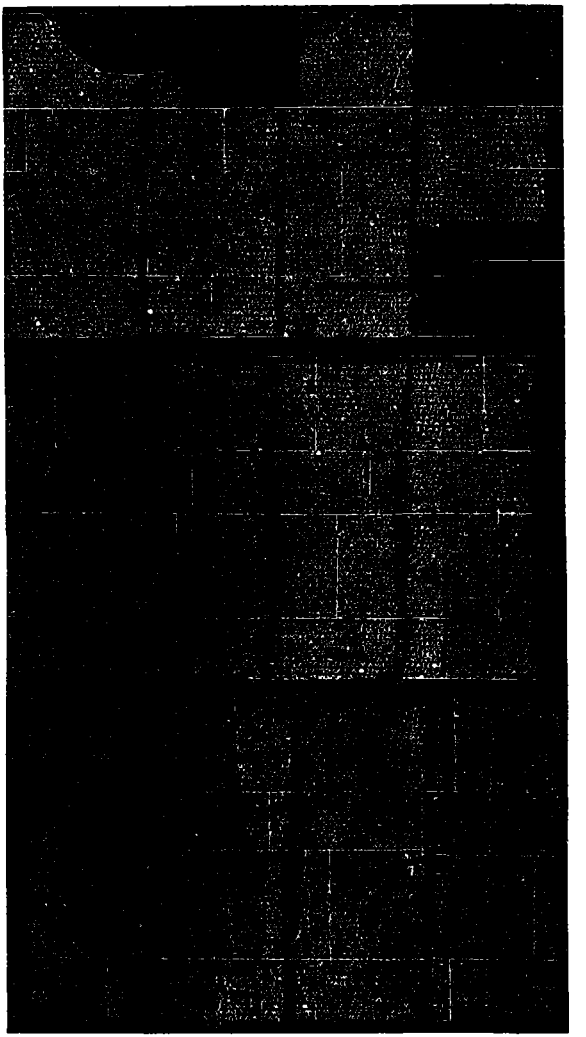
None of the law records of the Minos period have yet been found. But the oldest statute-law now extant belongs also in Crete, about 1000 years later,—the law of the city of Gortyna, dating from perhaps B. C. 400.

This inscription, the largest extant fragment of any Greek law, came to light less than fifty years ago; for the

III

II

I



VI. 15—City-Law of Gortyna, B. C. 400

The restored original forms an oblong horizontal stone wall, 30 feet long. As here divided, to fit the book-page, the lowest third is the left-hand end. The topmost third, forming the right-hand end, shows where stones are missing



VI. 16—GORTYNA LAW (enlarged sample)

The Cretan writing, in those days, read from left to right (in the top line), then turned and read from right to left, and so on

stones on which it was chiseled had become buried for two thousand years or more; and its discovery made a sensation in the learned world. It was about thirty feet long in its original form;[15] the broken pieces are now scattered in

several museums; but a plaster facsimile of the whole is preserved in the Academy of the Lynx at Rome. The inscription illustrates, on closer view, that at that period of literature the Cretan writing ran in alternate lines from left to right and then from right to left; turning about, as the ox turned in ploughing furrows; hence the term "boustrophedon" for this style of writing.[16]

The first paragraphs of this law prescribe the mode of trying an issue of personal freedom, or slavery; the later ones deal chiefly with the inheritance of property. A few passages will illustrate the fairly primitive style (and it will be noted that the Twelve Tables of Rome, attributed to about the same date, and reputed to have been drafted on a Greek model, represent a style only a little more primitive).[i]

[*City Laws of Gortyna.*] [1] "Whoever claims for his own another person, whether free or slave, shall not distrain him before suit. If he does, he shall be adjudged to pay for such distraint 10 staters to the freeman or 5 staters to the slave, and to release him within 3 days. If he does not release him, he shall be adjudged to pay, for each day of delay, 1 stater to the free man or 1 drachma to the slave. The time shall be determined by the judge's oath. If he denies the distraint, the judge's oath shall determine, if there is no witness. . . .

[25] "To the father belongs the power over the children and the property, and he may make partition of the property; and the mother likewise as to her own property; but while they live partition is not demandable. But if one child is adjudged liable to pay to

some one, the prescribed share may be allotted to the child so adjudged.

[26] "If a man dies, his town houses and all therein, except such houses as occupied by serfs attached to the rural lands, and the sheep and large cattle, except those in a serf's possession, shall go to the sons. All the rest of the property shall be divided, as fairly as may be, two parts to each son however many there are, and one part to each daughter, however many there are.

[27] "The mother's goods also shall be divided, if she dies, in the same manner as the father's.

[31] "If a man or a woman dies, and if there exist children, or children's children, or the latter's children, this group shall have the property. And if none of these exist, then the deceased brothers and their children and the latter's children, this group shall have the property. And if none of these exist, the sisters of the deceased and their children and the latter's children, this group shall have the property. And if none of these exist, then the other relatives whoever they are, this group shall have the property. And if no other relatives exist, all those who are the household's serfs, these shall have the property

[36] "While the father lives, the father's property shall not be sold nor mortgaged by the son; but what the son has himself earned or received by partition he may dispose of as he pleases. Nor shall the father dispose of property earned by the children or partitioned to them, nor the husband dispose of nor bind the wife's property, nor the son the mother's.

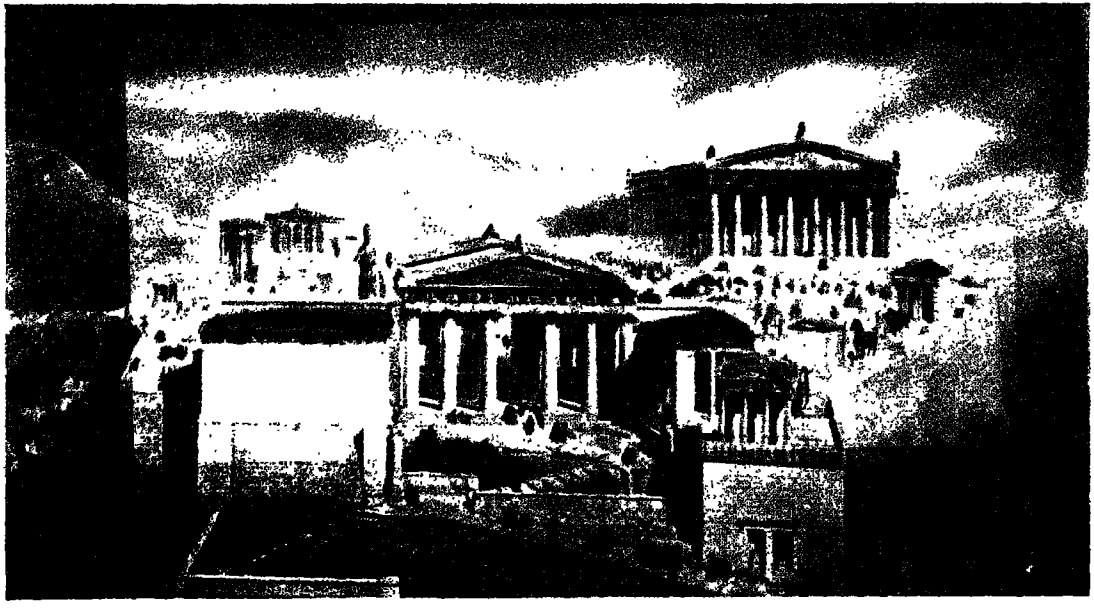
[37] "If any one buys or takes in mortgage or receives an obligation on property other than as prescribed herein, the property shall remain in the mother or wife, and he who has [fraudulently] sold, mortgaged, or promised it shall pay double to the vendee, mortgagee, or promisee, and the full amount of any other loss caused; but transactions prior to this law shall not be adjudged by

it. If the opponent [in a proceeding under this law] disputes that the property belongs to the mother or wife, the claim shall be adjudicated before the court having jurisdiction.

[38] "If a mother dies leaving children, to the father belongs the power over the mother's property, but he shall not dispose of or mortgage it, unless the children consent, being of age. And if any one buys or takes a mortgage contrary hereto, the property shall remain in the children, and to the buyer or mortgagee he who has [fraudulently] disposed or mortgaged shall pay double the sum, and also the full amount of any loss caused.

[39] "If the father marries another woman [after the first wife's death], the children shall have the power over their mother's property".

The name of Solon, the legislator (who lived about B. C. 600), is forever associated with the laws of Athens. Solon typifies the thorough democratization of Athenian law and justice. It was that wise old statesman who, when asked by a friend whether the laws he had framed for the people of Athens were the best possible, answered, "Yes,—Yes, indeed, the very best—that they could endure!" In Solon's time the laws passed by the Assembly were publicly preserved in wooden or bronze or stone tablets on the Acropolis,—the crowning glory of Athens.[17] Particular laws of Solon, and numerous other separate laws or statutes of Athens, and the other city-states, are frequently quoted in the orations still extant; but only a few minor ones have survived the ravages of time in their original records.



VI. 17—The Acropolis

7. *Legislation*

The following law of Solon, quoted in one of Demosthenes' speeches, illustrates the style of enactment in Solon's period:[j]

"If a man has recovered the article which he has lost, the thief shall be condemned to pay the double value; if not, to pay tenfold, besides the cumulative penalty; and he shall be kept in the stocks five days and as many nights, if the jury-tribunal shall have imposed such sentence. And any person who likes may propose the additional penalty, when the question of a penal sentence is before the court. And if any one is taken off in custody after conviction for ill-treatment of parents, or for desertion, or for entering where he has no business to enter after notice of exclusion from legal privileges, the Eleven shall put him in prison and shall bring him before the jury-tribunal; and any one that pleases, to whom such right belongs, may prosecute; and if the party accused be convicted, the jury-tribunal shall determine what penalty, corporal or pecuniary, he shall suffer; and if he be sentenced to a pecuniary penalty, he shall be imprisoned until he has paid."

But by the time of Demosthenes, two and a half centuries later, legislative draftsmanship had developed a high degree of technical phraseology. The following law, the subject of Demosthenes' attack in the above-mentioned speech, had recently been passed on motion of Timocrates the defendant:[j]

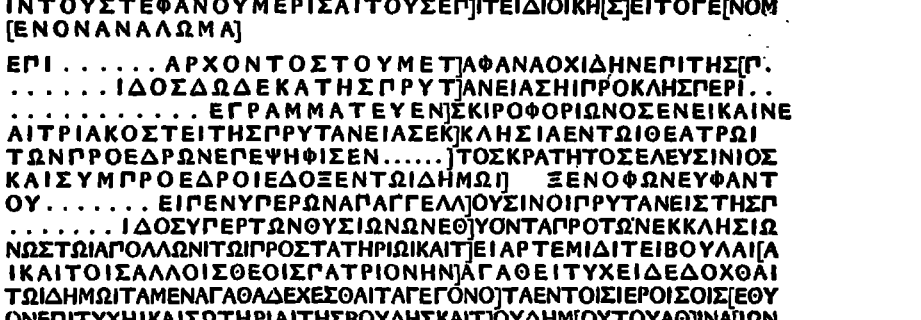
[*A Greek Enactment, B. C. 300.*] "In the first presidency, to wit, that of the Pandionian tribe, on the twelfth day thereof, Timocrates moved: If any of the persons who are indebted to the State has been or shall hereafter be condemned, pursuant to a law or to a decree, to suffer the penalty of imprisonment, it shall be lawful for him, or for another person on his behalf, to put in such bail for the

debt as the people shall approve, to be security for payment of the sum which he owed, and the committee of council are hereby required to take the votes of the assembly, when any one wishes to put in bail; and the person who has given bail, if he pays to the State the money for which he gave the bail, shall be released from imprisonment; but if neither he nor his bail shall have paid the money in the ninth presidency, the party released on bail shall be imprisoned, and the property of the bail shall be confiscated. Provided that, in the case of farmers of the taxes and their sureties, the State shall be at liberty to recover her dues according to the established laws. And if any one is indebted in the ninth presidency, he shall pay his debt in the ninth or tenth presidency of the following year."

The speech prepared by Demosthenes on this occasion serves to illustrate the unique machinery of legislation which had developed in Athens under government by mass-rule without a senate or a judiciary. Its peculiarity was this: Instead of the system of "checks and balances" supplied in modern times by separation of departments, second chambers, and constitutions controlling statutes, the expedient was devised of making the mover liable to prosecution at a later assembly for proposing unconstitutional legislation. It was in a prosecution of this kind that Demosthenes delivered his great oration on the Crown already mentioned; he was defending the author of a resolution awarding him a gold crown for his patriotic services.[18] The method is thus described:[k]

"The process of legislation in Athens involved the services of a group of dicasts [or, citizen-jurors]. Once a year the assembly con-

7. *Legislation*


. ΚΑΙΣΤΕΦΑΝΩΣΑΙΑΥ]ΓΟΝΘΑΛΛΟΥΣΤΕΦ[Α
ΝΩΙΑΝΑΓΡΑΨΑΙΔΕΤΟΔΕΨΗΦΙ]ΣΜΑΤΟΝΓΡΑΜΜΑΤΕΑ[Τ
ΟΝΚΑΤΑΠΡΥΤΑΝΕΙΑΝΕΝΣΤΗΛ]ΕΙΛΙΘΙΝΕΙΚΑΙΣΤΗΣΑΙ[ΕΝ
ΤΩΙΠΡΥΤΑΝΕΙΩΙΕΙΣΔΕΤΗΝ]ΑΝΑΓΡΑΦΗΝ[Κ]ΑΙΤΗΝΓΟΙ[ΗΣ
ΙΝΤΟΥΣΤΕΦΑΝΟΥΜΕΡΙΣΑΙΤΟΥΣΕΓ]ΙΤΕΙΔΙΟΙΚΗ[Σ]ΕΙΤΟΓΕ[ΝΟΜ
[ΕΝΟΝΑΝΑΛΩΜΑ]

ΕΓΙ ΑΡΧΟΝΤΟΣΤΟΥΜΕΤ]ΑΦΑΝΑΟΧΙΔΗΝΕΓΙΤΗΣ[Γ.
. ΙΔΟΣΔΩΔΕΚΑΤΗΣΠΡΥΤ]ΑΝΕΙΑΣΗΙΓΡΟΚΛΗΣΓΕΡΙ. .
. ΕΓΡΑΜΜΑΤΕΥΕΝ]ΣΚΙΡΟΦΟΡΙΩΝΟΣΕΝΕΙΚΑΙΝΕ
ΑΙΤΡΙΑΚΟΣΤΕΙΤΗΣΓΡΥΤΑΝΕΙΑΣΕΚ]ΚΛΗΣΙΑΕΝΤΩΙΘΕΑΤΡΩΙ
ΤΩΝΓΡΟΕΔΡΩΝΕΓΕΨΗΦΙΣΕΝ]ΤΟΣΚΡΑΤΗΤΟΣΕΛΕΥΣΙΝΙΟΣ
ΚΑΙΣΥΜΓΡΟΕΔΡΟΙΕΔΟΞΕΝΤΩΙΔΗΜΩΙ] ΞΕΝΟΦΩΝΕΥΦΑΝΤ
ΟΥ ΕΙΓΕΝΥΓΕΡΩΝΑΠΑΓΓΕΛΛ]ΟΥΣΙΝΟΙΓΡΥΤΑΝΕΙΣΤΗΣΓ
. ΙΔΟΣΥΓΕΡΤΩΝΘΥΣΙΩΝΩΝΕΘ]ΥΟΝΤΑΠΡΟΤΩΝΕΚΚΛΗΣΙΩ
ΝΩΣΤΩΙΑΠΟΛΛΩΝΙΤΩΙΠΡΟΣΤΑΤΗΡΙΩΙΚΑΙΤ]ΕΙΑΡΤΕΜΙΔΙΤΕΙΒΟΥΛΑΙ[Α
ΙΚΑΙΤΟΙΣΑΛΛΟΙΣΘΕΟΙΣΓΑΤΡΙΟΝΗΝ]ΑΓΑΘΕΙΤΥΧΕΙΔΕΔΟΧΘΑΙ
ΤΩΙΔΗΜΩΙΤΑΜΕΝΑΓΑΘΑΔΕΧΕΣΘΑΙΤΑΓΕΓΟΝΟ]ΤΑΕΝΤΟΙΣΙΕΡΟΙΣΟΙΣ[ΕΘΥ
ΟΝΕΓΙΤΥΧΗΙΚΑΙΣΩΤΗΡΙΑΙΤΗΣΒΟΥΛΗΣΚΑΙΤ]ΟΥΔΗΜ[ΟΥΤΟΥΑΘ]ΙΝΑ[ΙΩΝ
ΕΓΕΙΔΗΔΕΟΙΓΡΥΤΑΝΕΙΣΤΑΣΤΕΘΥΣΙ]ΑΣΕΘ[ΥΣΑΝ

VI. 18—Athenian Enactment, about B. C. 300

sidered the advisability of accepting proposals for changes in the laws. If the vote was favorable, all suggestions for changes, together with the laws to be abrogated or amended, were posted in the market-place and filed with the clerk of the assembly, who read them at the two succeeding meetings. The assembly then made provision for the selection by lot of a group of dicasts called 'nomothetes', or legislative commissioners. The number varied. Commissions of five hundred and of one thousand are mentioned. The proceedings were the same as in a regular court. It was the duty of the commissioners to listen to the proposer of the new law or amendment, to the five public advocates appointed to defend the law impugned, and to any other citizens who cared to speak on either side. The issue was decided by a majority vote. During one year after the passage of a new law the mover was liable to indictment and punishment for unconstitutional legislation. The unconstitutionality might consist either in the character of the legisla-

tion or in the failure to observe the procedure provided by law. The penalty was assessed by the jury and might be severe. After the expiration of a year the mover was free from personal liability, but the law could be attacked at any time. The process of legislation was a fruitful source of litigation. The indictment for unconstitutional legislation was the favorite political weapon of the fourth century. Litigation was the handmaid of politics. Aristophon, a prominent politician contemporary with Demosthenes, is said to have boasted that he was indicted seventy times for unconstitutional measures."

8. The transactional instruments of Greek practice, which have come down to us in full textual terms, are scanty,—a few score, in comparison with the thousands from Egypt and Mesopotamia; but they reveal an elaborate development. The variety of types represented is also smaller; but the carefulness of concrete detail, the prevision of contingencies, and the practicalness of the measures provided, show that Greek commercial experience and Greek intellectual keenness had already developed a standardized conveyancing which marked a decided advance over any of the earlier systems.

Let us glance at four typical instruments,—a land-transfer record, a land-lease, a loan, and a contract of drainage.

(*a*) Many or most of the Greek cities had established record-offices where the transfers of land must be entered in abstract. The following entries are from a record

found at Tenos, dating about B. C. 200, and containing some fifty entries; the standardized form is noticeable:

[*Land-Transfer Record.*] . . "Antichares, son of Euporion of Thryese, has bought of Pasiphon, son of Peirios of Donakea, the house and lands located at Eleonte, with the appurtenances of the said lands, and the water, to which the abutters are , bounded by the road leading from the suburb to the watch-tower and below, the whole being the same property bought by Pasiphon from Simos son of Anaxicles; consenting are N. daughter of Antipater of Thryese, and N. daughter of the said N. of the Phykean tribe, and their guardians Antichares son of Euporion of Thryese, and Celophanes son of Cleotheos of the Eleithyean tribe, for five thousand silver drachmas". . . .

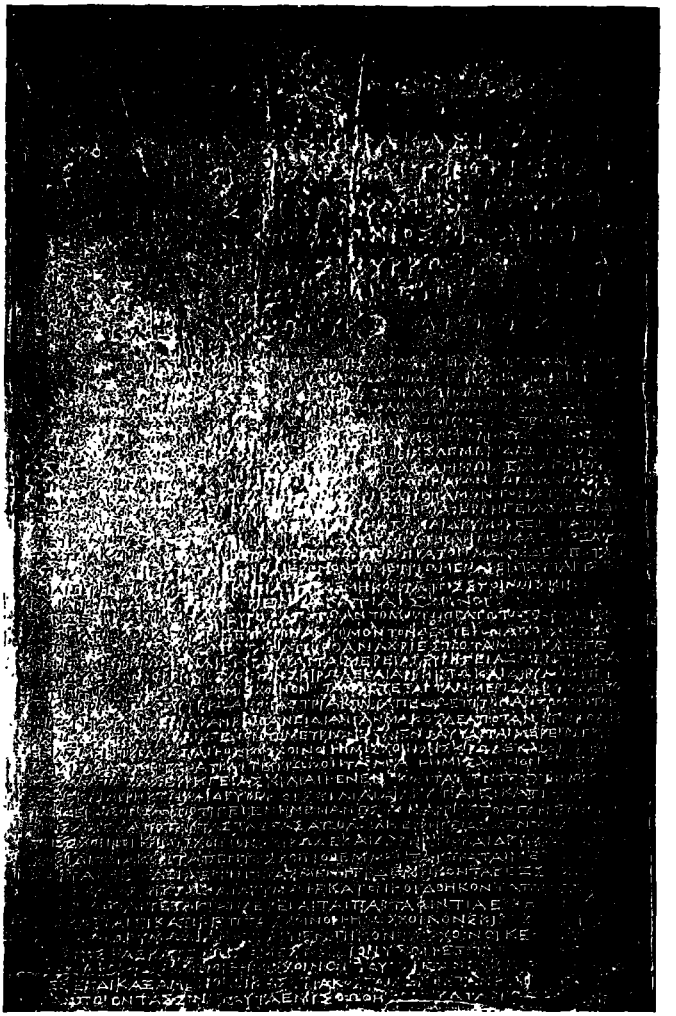
"Artymachos, son of Aristarchos, a Heraclidean, has bought of Telesicles son of Eucles a Heraclidean the house and lands located at being the share of property inherited by Telesicles from his father and the further property bought by him from his brother Calliteles, to which the abutters are Pleistarchos and Artymachos, together with all the appurtenances belonging to Telesicles and Calliteles, the water-channels existing in the said lands, and a fourth part of the watch-tower, the cistern in the tower and the tiled roof belonging to Telesicles, as well as the house and the orchard bought by Telesicles from Euthygenes, also the pottery in the houses and the millstone and the mortar, for thirty-seven hundred silver drachmas. Warrantors of the sale [naming nine persons]; all bound jointly and each for the whole".

(*b*) The following lease was made about B. C. 350, as the result of a lawsuit brought by the people of Heraclea to eject a number of persons who had encroached on the cultivated lands of the city's Temples of Dionysos and of

Athena Polias. The city first ordered a re-survey of the lands, and then proceeded to lease them out, on a tenure virtually emphyteutic (or, copyhold). The whole transaction was then inscribed on tablets of bronze.[19] The lands were classified into four lots, and the leases of the first lot ran in these terms:[m]

[*Lease.*] "In the mayoralty of Aristion, month of Apelleos, the city and the wardens [naming three persons] and the survey-commissioners [naming five persons] do lease the sacred lands of Dionysos, as now held by them, for life, on the terms decreed by the people of Heraclea: [1] The lessees shall take the fruits thereof for all time, so long as they shall give security and pay the rent annually in the first ten days of the month Panamos; if they choose to pay in advance [of the crop] they shall deposit in the public granary and measure by public scales, before the grain officials annually elected, the full amount of barley clean and merchantable equal to the product of the land leased. [2] They shall furnish for each term of five years, to the warden in office in that year, sureties acceptable to the said wardens. [3] If the lessees assign to any other person the land leased, or devise or sell the right to the produce, the assignees, devisees, or purchasers shall furnish sureties in the same manner as the original lessees. [4] Any lessee who fails to furnish surety or pay rent as provided shall pay to the wardens and the grain-officials a double rent for the current year and also all the value lost [by a re-lease], that is to say, the difference between the amount of rent for the first five years of the new lease and the amount due for the same period under the old lease, and furthermore all plantations and buildings put upon the land shall be the property of the city."

"The mode of cultivation shall be as follows: [5] The lessee of the first lot [. . describing it] shall plant in vines at least 10 rods,



VI. 19—Lease at Heraclea, B. C. 350

This lease, containing some seventeen paragraphs, covered one of four lots of land belonging to the city of Heraclea

and in the part suitable for olives, shall plant at least 4 feet of olives per rod. If the lessee claims that the land will not grow olives, the wardens for the time being, calling in such citizens as they see fit, shall make a sworn survey and shall report to the city assembly, comparing the soil in question with that of adjacent lands. [6] The lessees shall maintain all trees thereon. Trees which die of old age or are overthrown by the wind shall belong to the lessees. [7] They shall be ready with all trees, plantations, and perennials, in number equal to those described in the contract, every fifth year beginning with the year after the [current] year of the mayoralty of Aristion. If the plantations have not been made according to contract, the lessees shall be adjudged to pay 10 pieces of silver per foot of olives and 2 minas per rod of vines. The wardens for the time being, after calling upon at least 10 citizens selected from the people, shall examine whether the lessees have planted according to contract. They shall enter in their report the names of those planting and the number of trees planted, also the names of those who have failed to observe the terms of the contract, and shall proceed to collect the penalties as well as the rent due. [8] If any person appropriates the temple lands and pastures and animals therein, or removes anything, destroys, breaks, or saws timber, or commits other waste of that sort, the lessee shall proceed against him for the heaviest penalties, and the fine imposed shall go to him. [9] The canals and ditches on the said lands shall not be deepened nor drained nor dammed, either to increase the flow therein or to divert it; the lessees shall as often as needed dredge those that traverse their respective lands; the roadways shall not be cultivated, nor shall they be fenced or obstructed for passage. In case of violation of these provisions, the wardens for the time being shall fine or cause them to be fined until they observe the terms of the contract. [10] The lessee shall neither destroy nor cut nor saw any tree, neither himself nor any one on his behalf; he shall make neither mound nor hole other than those now on his plot; he shall neither open nor allow to

be opened any quarry in the temple land; otherwise he shall be deemed guilty of profaning sacred land. [11] He shall build on the land buildings as follows, a cattle-stable, a shed, and a barn; the stable to be 22 feet long by 18 feet broad, the barn not less than 18 feet long by 15 feet broad, the shed 15 feet each way, the same to be finished, enclosed, and roofed within the period above provided for the plantations; failing which they shall be adjudged to pay a penalty of 6 minas for the stable, 4 minas for the barn, and 3 minas for the shed. [12] The brushwood and undergrowth they shall neither sell nor cut nor burn; nor allow another to do so; failing which they shall be liable according to the law and the contract; provided that they may make use of timber for construction and for vine-poles, and may cut dead wood as needed for household uses; no lessee to take brushwood or undergrowth other than from his own plot. [13] The vines and fruit trees dying of old age are to be replaced by the lessees so that their number be always equal to contract. [14] The lessees shall not mortgage nor hypothecate the said lands, whether buildings or ground, otherwise they shall be liable according to law. [15] If a lessee die without children or will, the city shall have the entire enjoyment of the premises. [16] If the lessees are evicted by reason of war, so as to lose enjoyment of the lands, the lease shall be cancelled, on terms to be decided by the people of Heraclea, and neither the lessees nor their sureties shall be liable under this contract. [17] The sureties given from time to time shall be responsible for rents, penalties, loss of value on release, and for judgments; they shall be liable both in person and in property as proved by witnesses; they shall not be entitled to dispute any liability of the lessee, nor to evade indirectly any claim of the city or its representatives."

Who can doubt that this instrument represents a long accumulation of experience in technical draftsmanship and legal maneuvers?

(*c*) The high degree of development of Greek banking is well known. In its legal aspect, the forms of obligation kept equal pace. In the following contract (one of five), dating about B. C. 200, a banker of Naxos lends money to the city of Arkesine, the city assembly having authorized commissioners to negotiate the loan:[n]

[*Loan.*] "May Good Fortune be upon us! [1] In the month Hecatombeon, at Naxos, the mayors being . . . and Sostratos, and in the month of Miltophorion, the mayor being Ctesiphon, Praxicles son of Polymnestos has loaned to the city of Arkesine three talents of Athenian silver, with no risk whatever for Praxicles, at interest of five obols per mina per month, Portomachos and . . . having come as loan-commissioners pursuant to a resolution of the assembly passed on motion of Stesagoras. [2] Praxicles has been given a lien on all the common property of the city and upon the individual properties of the citizens of Arkesine and of its inhabitants alike on land and on sea. [3] Interest is to be paid annually by the treasurers charged with collecting the revenues of Arkesine; in default of payment, the treasurers who default shall be liable to levy and execution by Praxicles, who shall be entitled to realize from their individual property one and a half times the amount due, by the usual modes of execution, as if judgment had been rendered therefor, pursuant to the treaty between the Naxians and the Arkesinians; and such sum shall not be deducted from the amount of the loan, but the city shall notwithstanding pay the interest, and if not, the interest unpaid shall be added to the capital sum and bear like interest payable annually. [4] The principal sum shall be payable within six months after demand by Praxicles or by his agent authorized thereto. [5] All payments, both of principal and

interest, shall be made at Naxos, to Praxicles or a person authorized by him, in coin of Athens or Alexandria current in that city, of full weight and good alloy, net and free of charge, as may be demanded by Praxicles. [6] In case the capital sum is not paid as provided herein, the Arkesinians herewith agree and contract that they owe to Praxicles six talents; Praxicles shall be entitled to recover this amount by the usual methods of levy upon all the common property of the Arkesinians and upon the individual property of the Arkesinians as well as of the inhabitants thereof, both from each and every one the whole sum, as well as from all, in the same manner as if judgment had been given against them in the court of arbitration as provided in the treaty between the Naxians and the Arkesinians, and free from any liability for taking such measures; and nothing so taken or seized by Praxicles shall be credited to the Arkesinians as payment on the sum due and unpaid. The Arkesinians shall impose no penalty, nor make any hindrance, [neither to himself] nor to any other persons so taking property by order of Praxicles. If any citizen of Arkesine or inhabitant thereof lays hands on those acting herein for Praxicles, or hinders his levy, on any pretext whatever, he shall pay to Praxicles one talent of silver, and this sum shall be recoverable from him as if judgment had been rendered for Praxicles in the court of arbitration as provided in the treaty, and this amount shall not be credited to the city as payment on the loan. If any loss or damage is incurred by Praxicles by reason of this levy on property, it shall be charged to the city of Arkesine, and the whole amount of it shall be paid with the rest of the loan. [7] It is agreed by the Arkesinians that nothing shall overthrow this contract, and that neither law nor vote nor decree nor mayor nor other officer shall rule otherwise than as provided in this contract, nor shall anything whatever on any ground or pretext avail against it, but this contract shall control wherever invoked, whether by the lender or by those acting for him. [8] The Arkesinians agree that this contract

shall be inscribed and published at Arkesine [in the temple of] on a marble pillar within sixty days after receiving the report of the loan-commissioners; and if not, to pay a forfeit of as provided in the contract now in the hands of Eurycles.

"[Signed] Praxicles

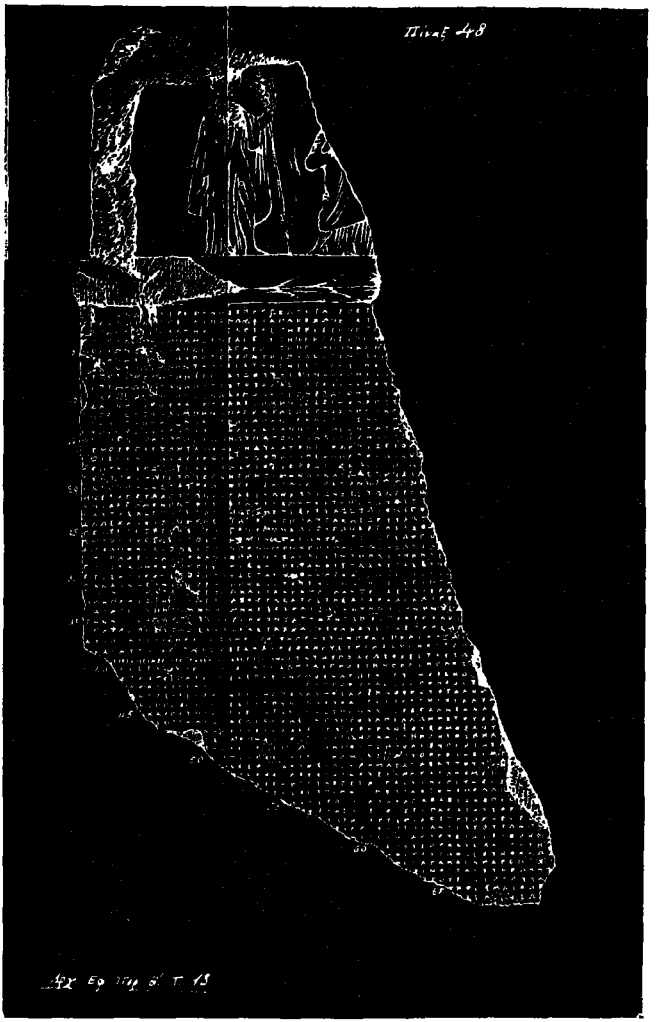
Witnesses: Eurycles [and six other names]."

It would seem, from the closing provisions of this instrument, providing for confession of judgment by the debtor, and for validating the contract against any impugnment by statute or court, that the draftsmanship of Greek creditors had already discovered most of the safeguarding devices which modern ingenuity employs in our own transactions.

(*d*) One of the most technical fields of legal draftsmanship is that of contracts to improve real estate, especially contracts for public works. In the following instrument,[20] dating about B. C. 300 (discovered in 1860, and now at Athens), the city of Eretria contracted for the draining of a marsh; the undertaker was here an alien, probably a professional in his line; the instrument was inscribed on marble slabs:[o]

[*Contract to Drain a Marsh.*] "Following are the terms by which Chaerephanes engages with the Eretrians to divert and drain the marsh at Ptechae:

"[1] The contractor shall bear all expense of the work of drainage, but he shall be exempt from import and export dues on materials necessary for the work, and this shall cover imports of all



VI. 20—CONTRACT TO DRAIN A MARSH, B. C. 300

This contract, inscribed on marble slabs, was discovered in 1860, and is now at Athens

stone and wood needed for the work, as customary for public undertakings. [2] When he shall have drained the marsh, he shall enjoy the use of the land of the marsh, paying thirty talents rent, for ten years, payment to be made to the city in instalments each year. [3] Chaerephanes shall drain the marsh within four years at most, the time of this contract to begin from the year after that in which Hippokydes and his colleagues are in office, and the period of four years to begin from that time. [4] Chaerephanes shall be exempt from all dues on sales of produce from such land, if sold in Eretria and not exported. [5] The citizens bind and engage themselves to Chaerephanes, by oath taken in the temple of Apollo Daphnephoros, to let him enjoy the use of these lands for thirty talents during ten years, from when he shall have drained the marsh, this contract to be inscribed on a stone tablet containing the contract and the oaths and all other matters, and to be placed in the temple of Apollo Daphnephoros. If during the work a war shall hinder Chaerephanes from completing the drainage as provided herein, then when it shall be feasible [to resume] on return of peace, he shall be allowed an additional time equal to the duration of the war. If later a war intervenes and it shall not be feasible to enjoy the use of the marsh-lands, ... an additional time, equal to that of the war, shall be allowed when use can be resumed. [6] Chaerephanes shall be entitled to dig underground conduits under lands that are individual property, but he shall not dig until paying therefor. At the line of the marsh, if adjacent land is needed, he shall pay at the rate of one drachma per foot, at the time of doing the work. [If he makes drain-ditches], he shall carry them around cultivated land and shall preferably carry them through land not cultivable. For the discharge of ditches, he shall construct a basin not to exceed two square stadia in area. During the period of occupation of the leased land, he shall care for the upkeep of the underground channels and all others, and shall maintain all in good condition. He shall erect a fence around the basin, and at the point of exit of water from the basin to the under-

ground channel, he shall construct a so that when the water accumulates the farmers who need it may close the entrance to the channel and make use of the water without [7] If Chaerephanes dies before draining the marsh, ... this contract shall be binding with his heirs. [8] If any person, whether private citizen or official, by writing or by vote, proposes to annul this contract, or compels Chaerephanes and his associates to break this contract, on any ground or pretext whatever, he shall be disfranchised, his property forfeited by attainder to Artemis, and he himself and his family shall suffer outlawry. [9] Chaerephanes shall give sureties who will engage by oath that when he shall have drained the marsh the said marsh shall be dry, and that he shall pay the thirty talents for the enjoyment of the land. [10] [Execution by the City] The councillors having recommended [the foregoing terms], the council and the people voted that the terms of the contract with Chaerephanes should be inscribed, both the foregoing terms and the following [additional ones]:

"During the progress of the work for the city, the contractor shall be exempt from interference by process both on land and on sea, in war and in peace, both Chaerephanes himself and all those engaged in the work with him. This exemption shall apply to Chaerephanes and to all engaged with him in the work from time to time; provided that if any third person has a right of attachment against the city, this shall not be exercised against those working with Chaerephanes before they have settled their accounts with the city.

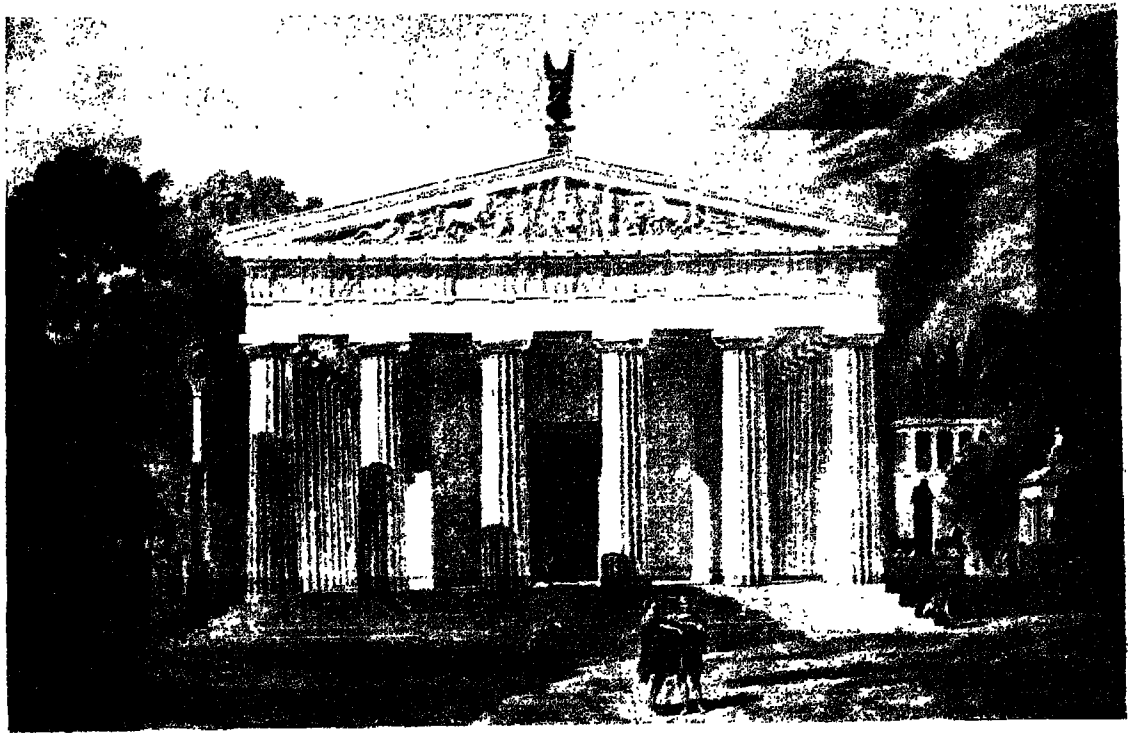
"Sureties: [follow five names]

"[11] The councillors having recommended, the council and the people approved, that all the citizens shall bind themselves to Chaerephanes by oath at the temple of Apollo Daphnephoros, and whoever shall not make oath shall be disfranchised. . . . [Then follow some details of the oath-procedure]. The oath shall be as follows: 'I swear by Apollo and Latona and Artemis to let Chaere-

phanes enjoy the use of the land of the marsh on the terms of the contract made by the city concerning said marsh; if any person breaks the contract with Chaerephanes, I shall oppose him to the extent of my power, pursuant to our common oath. If I observe my oath, may many good things come to me, and if I break it, may I be ruined, I and all my property'. [Then follow further provisions to carry out par. 8 above.] [12] "Counterparts of this contract shall be [deposited] at Megara and at Andros. [The above] vote of the people"

It is known that the Eretrians, in their period of prosperity, once celebrated the festival of Artemis with a procession of three thousand soldiers, six hundred horsemen, and sixty chariots. We can accept this contract (evidently the product of standardized experience) as representative of the development of the technique of conveyancing in a hundred busy small city-states of Greece, by the period B. C. 300. A stage far beyond that of Egypt and Mesopotamia has here been reached.

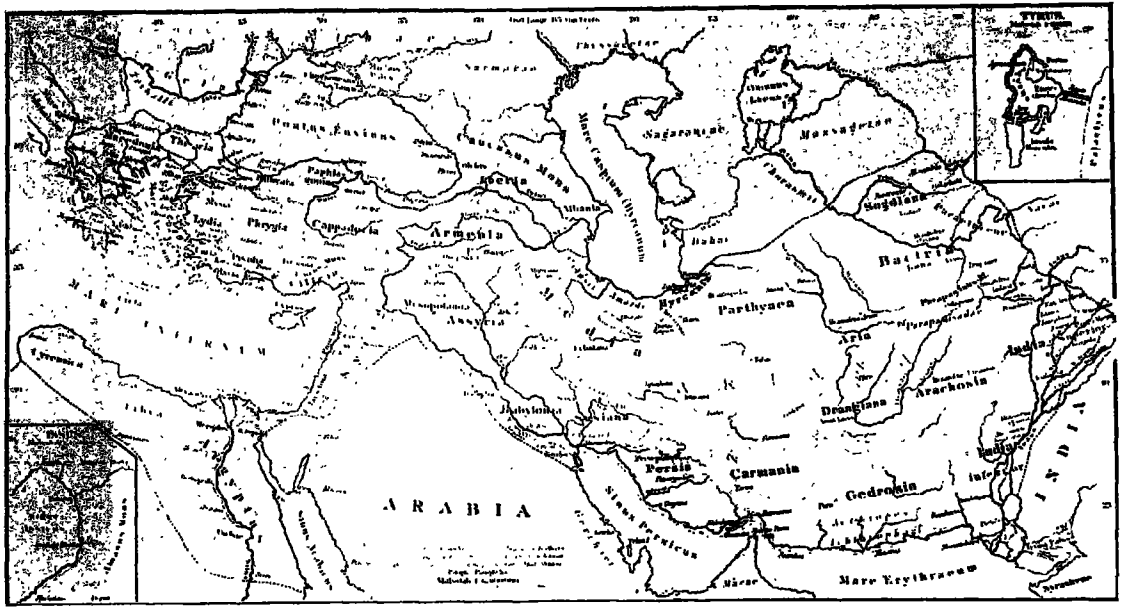
9. But with all this wealth of advanced types of transactional forms, there is still something lacking. Looking back over the Greek records, and comparing them with those of the peoples that preceded and followed, the truth seems to be, that though the Greeks had a system of justice, it can hardly be said that they had a system of law,—in the Roman and the modern sense of the term.[p] They constructed no codes. They reported no reasoned decisions. They wrote no doctrinal treatises. They de-



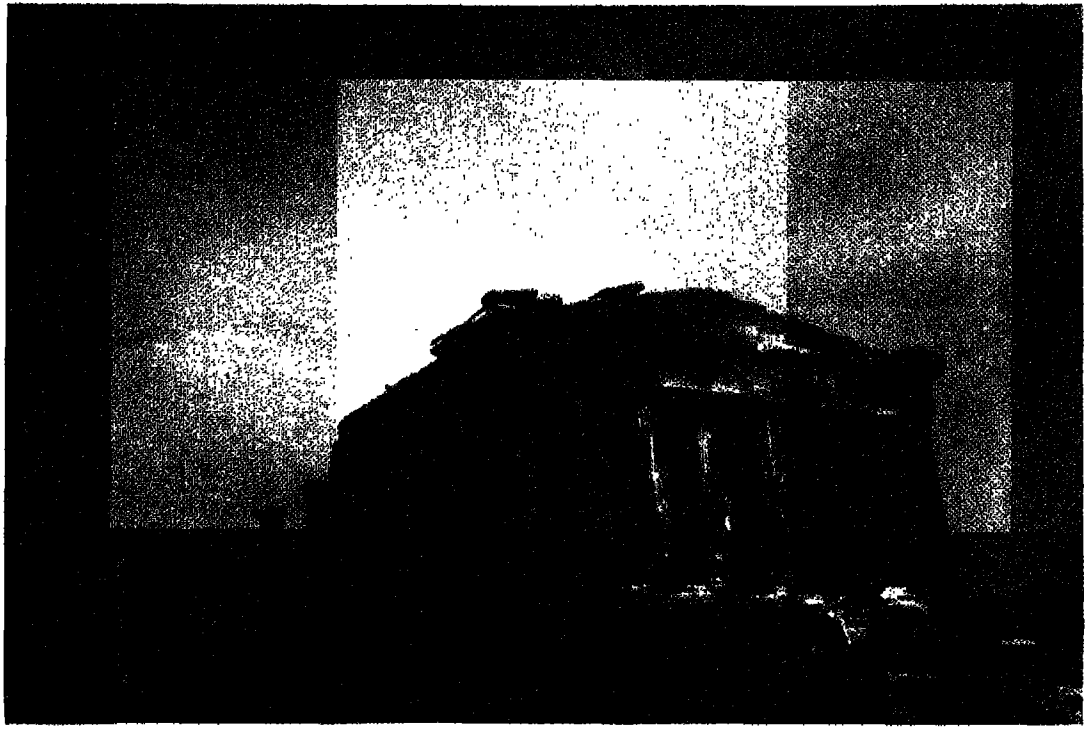
VI. 21—Temple of Zeus at Olympia

veloped architects, philosophers, sculptors, and painters; but no professional judges or jurists. Their one juridical contribution, the popular jury-court, took a form most susceptible to caprice, and essentially incompatible with any science of law. They lavished their wealth on temples (witness the temples at Olympia[21]); but not, as the Romans did, on court-houses.

The Greek mind exhibited a genius for the fine arts,—a passion for politics,—an infinite faculty for philosophy,—and a leadership in literature. But, relatively, these talents found no aptitude for jurisprudence. Their temples, their statues, their dramas, are models for all time. Their experience in politics still has lessons for us today. Their speculations in philosophy leave little for modern thought to invent. The Greek language was carried by Alexander's conquests eastward and southward, over almost the then known world;[22] and in Egypt it came to be employed as the vehicle of philosophy, of religion, and of law, under Roman rule, for seven centuries after Alexander's empire had fallen; so much so that, by the recent copious discoveries of Egyptian papyri applying Roman law in the Greek language, the modern study of Roman law has been almost revolutionized. In short, Greek legal science, had such a thing existed, was in a most favorable position to survive and to serve as a model for ensuing nations.



VI. 22—Map of Alexander's Empire



VI. 23 The Parthenon at Sunset

9. *Greek Legal Science*

But Alexander's vast empire left surviving it no permanent monument of Greek law. Even the ruins of the Parthenon are still zealously studied and measured by modern architects.[23] Every scene of Greek tragedy, and every school of Greek philosophy, must be familiar to modern masters in those fields. And the resurrected texts of Roman law are still perused by thousands of students in every country as the ultimate source of a large part of the world's law today. But Greek law now interests only the historian and the philologist.

VI. Greek Legal System

Sources of Illustrations

1. *Map of Greece.* From the map in *Helen Zimmern*, "The Greek Commonwealth", appendix (Oxford, Clarendon Press, 1915).
2. *Temple of Themis.* From the illustration in "The Unedited Antiquities of Athens", chap. VII, plate 2, ed. The Society of Dilettanti (Longman, London, 1817).
3. *Socrates in Prison.* From a photograph by the *Bond Co.*, Chicago, of an unidentified painting.
4. *Aristotle's Government of Athens.* From the facsimile of the original in the British Museum, edited by *F. G. Kenyon* (London, British Museum, 1891).
5. *Juryman's Ballot.* From the illustration in *Morgan's* "Orations of Lysias", p. XLIII.
6. *Market-place at Athens.* From the illustration in *J. A. Harrison*, "The Story of Greece", frontispiece (New York, Putnam, 1890).
7. *Trial of Phidias.* From the facsimile in *Jules Nicole*, "Le procès de Phidias", appendix (Geneva, Kundig, 1910).
8. *Statue of Athena.* From a photograph by *Homer H. Kingsley*, Evanston, Illinois.
9. *Pericles Addressing the Assembly on the Pnyx.* From a reproduction, by the McIntosh Stereopticon Co., of an unidentified painting.
10. *Trial of Orestes.* From the drawing in *Walter Crane*, "Echoes of Hellas" (London, Marcus Ward, 1887).
11. *Trial of Phryne.* From a photograph by *Giraudon*, Paris, of the painting by *J. L. David*, in the Musée Dobrée, at Nantes.
12. *Demosthenes.* From a photograph of the original in the Vatican Museum.
13. *Aeschines.* From a photograph of the original in the Vatican Museum.
14. *Throne of Minos.* From a photograph by *Charlotte W. Lytle*, published in "The Mentor", April, 1924, p. 47.

15, 16. *Gortyna Inscription.* From a photograph of the original cast taken for the author by the Director of the Academy of the Lynx, at Rome, 1923.

17. *Acropolis.* From the engraving in "Bilder-Atlas", vol. V, plate 6 (Leipzig, Brockhaus, 2d ed., 1875).
18. The view shown is the text, not of the proposal for a crown to Demosthenes but of another Athenian enactment, about B. C. 300, awarding a crown; from a drawing in "Corpus Inscriptionum Graecarum", ed. *Aug. Boeckh* (Royal Prussian Academy, 1828), vol. I, pars II, No. 113, p. 155.

19. *Lease.* From a photograph, furnished by the Director of the National Museum at Naples, of the original inscription, known as the Tabulae Heracleenses.

20. *Contract to Drain a Marsh.* From a photograph, furnished by the Librarian of the University of Illinois, of a facsimile published in the "Archaeologike Ephemeris" (Athens), 1869, II series, vol. 13, No. 404, page 317, plate 48.

21. *Temple at Olympia.* From *W. Luebke* and *C. von Luetzow*, "Denkmäler der Kunst", vol. "Architektur", plate XI (Stuttgart, Neff, 4th ed., 1884).

22. *Map of Alexander's Conquests.* From the map in *F. W. Putzger's* "Historischer Schul-Atlas" (Leipzig, 16th ed., 1890).

23. *The Parthenon at Sunset.* From a photograph made and colored by Mr. and Mrs. *Homer H. Kingsley*, Evanston, Illinois.

Sources of Documents quoted in Text

aa. (Prologue): *Moore*, "Judaism," vol. I, page 235 (cited *ante*, chap. III).

a. Homer's Description of the Shield: The Iliad, book XVIII.

b. Authorities have differed as to the majority number of votes, owing to variant readings of the text in Plato's "Apology", ch. XXV; one reading would make it six.

c. Aristotle's Government of Athens. From the translation by Sir *Frederic G. Kenyon*, "Atheniensium Respublica", cc. 63-69 (Oxford, Clarendon Press, 1920).

cc. Lucian's Trial. From his "Double Indictment", transl. *A. M. Harmon*, in "Lucian", vol. III, p. 85 (Loeb Classical Library, 1921).

d. Greek Jury System. From *Charles Rann Kennedy*, "The Orations of Demosthenes", vol. IV, app. VI, p. 361 (London, George Bell & Sons, 1909).

e. Athenian Court. From *Mitchell's* edition of Aristophanes' Wasps, quoted in *Wm. Forsyth*, "Hortensius", p. 26 (3d ed., 1879).

f. Athenian Juries. From *W. S. Ferguson*, "The Fall of the Athenian Empire: Law and Politics in Athens" (Cambridge Ancient History, 1927, vol. V, chap. XII, p. 349).

g. Trial at Cnidos. From the French translation in *R. Dareste, B. Haussoulier*, and *Th. Reinach*, "Recueil des Inscriptions Juridiques Grecques", 1st series, p. 159 (Paris, Leroux, 1891).

h. Demosthenes' Speech. From the translation in *Kennedy* (cited *supra*), vol. V, p. 187.

i. Laws of Gortyna. From the Greek text and French translation in *Dareste, H. & R.* (cited *supra*), p. 352.

j. Solon's and Timocrates' Laws. From the translation in *Kennedy* (cited *supra*).

k. Method of Legislation. From *R. J. Bonner*, "Lawyers and Litigants in Ancient Athens" (1927), p. 98. The text of the law establishing this procedure is quoted in Demosthenes' speech above cited.

l. Land-transfer Record. From the Greek text and French translation in *Dareste, H. & R.* (cited *supra*), p. 67.

m. Lease. From the Greek text and French translation in *Dareste, H. & R.* (cited *supra*), p. 209.

n. Loan. From the Greek text and French translation in *Dareste, H. & R.* (cited *supra*), p. 313.

o. Contract to Drain a Marsh. From the Greek text and French translation in *Dareste, H. & R.* (cited *supra*), p. 145.

p. "Even the Greeks produced no true monument of jurisprudence. Law remained in Greece an appendage to rhetoric and ethics" (J. Declareuil, "Rome the Lawgiver", 1926, p. 9). "The key to the (Athenian) popular control of the judiciary was the principle that each panel, being a plenipotentiary committee of the sovereign people, was supreme and independent in its sphere; its authority could not be shared with a chairman or judge or curtailed by any other court. It follows that no body of case-law in equity or authoritative interpretations of statute law or binding precedents could be developed as in the English and American Systems." (R. J. Bonner, "Lawyers and Litigants in Ancient Athens", 1927, p. 74).

The following judgment has been expressed upon the Greek legal literature of a thousand years later, under the successors of Justinian: "The scientific activity of the Greeks devoted itself with the happiest results to the abstractions of theology. But when they took the law for their subject, this direction to their ideas, bent always on speculations, was calamitous for the development of the law. Great as was the superiority of the Greeks in the study and knowledge of the abstract idea of justice, equally inferior were they in the practical application of principles to the concrete circumstances of social life. Admirable as philosophers, they were the

reverse as practical jurists. Under the direct influence of Justinian or of the school founded by him, jurisprudence could shine with a passing brilliance in the A. D. 500's. But once left to themselves, the subjects of the Greek empire neglected those studies for which they had neither a calling nor a capacity." (J. A. B. Mortreuil, "Histoire du droit byzantin", Paris, 1843, vol. I, p. 118).

General References

Robert J. Bonner, "Lawyers and Litigants in Ancient Athens" (University of Chicago Press, 1927; the most realistic account of Athenian justice, covering the whole ground); "The Administration of Justice in the Age of Homer" (Classical Philology, VI, 12); "The Administration of Justice in the Age of Hesiod" (id. VII, 17); "Athenian Arbitrators" (id. XI, 191); "The Legal Setting of Isocrates' Antidosis" (id. XV, 193); "Evidence in the Areopagus" (id. VII, 450); "Evidence in Athenian Courts" (University of Chicago Press, 1905).

Robert J. Bonner and *Gertrude Smith*, "The Administration of Justice from Homer to Demosthenes" (University of Chicago Press, 1929).

Alfred P. Dorjahn, "Legal Precedent in Athenian Courts" (Philological Quarterly, October, 1928).

Sir *Paul Vinogradoff*, "The Jurisprudence of the Greek City" (vol. II of "Outlines of Historical Jurisprudence", Oxford University Press, 1922).

George M. Calhoun, "Oral and Written Pleading in Athenian Courts" (Trans. Amer. Philosophical Association, vol. L, p. 178); "The Growth of Criminal Law in Ancient Greece" (University of California Press, 1927); "The Business Life of Ancient Athens" (University of Chicago Press, 1926); (with *Catherine Delamere*) "A Working Bibliography of Greek Law" (Harvard University Press, 1927).

K. Freeman, "Work and Life of Solon" (London, 1926).

H. J. Treston, "Poine: a Study in Ancient Greek Blood-Vengeance" (London, 1923).

Gertrude Smith, "The Administration of Justice from Hesiod to Solon" (University of Chicago Press, 1924); "Athenian Political Commissions" (id. 1920).

Ludovic Beauchet, "Histoire du droit privé de la république athénienne" (Paris, 1897, 4 vols.).

VI. Greek Legal System

R. C. Jebb, "The Attic Orators from Antiphon to Isaeos" (London, 2 vols., 1876).

C. R. Kennedy, "Orations of Demosthenes" (cited *supra*).

G. Gilbert, transl. *Sandys*, "Constitutional Antiquities of Sparta and Athens" (New York, Macmillan, 1895).

A. H. J. Greenidge, "Handbook of Greek Constitutional History" (London, 1920).

R. Dareste, "Etudes d'histoire du droit", 1st series, 2d ed. 1908; 2d series, 1902; 3d series, 1906 (Paris, Larose).

W. Wyse, "Speeches of Isaeus" (Cambridge, 1904).

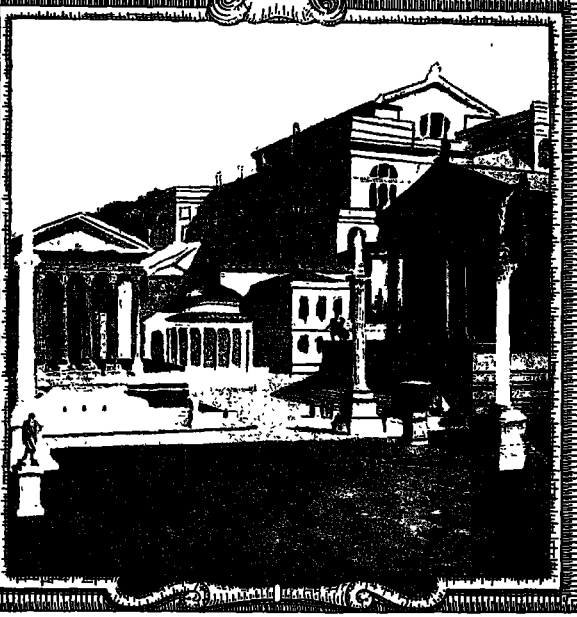
E. S. Forster, "Isaeus" (Loeb Classical Library, 1927).

C. D. Adams, "Speeches of Aeschines" (London, Heinemann, 1919).

A. E. Zimmern, "The Greek Commonwealth" (Oxford, 1911).

Egon Weiss, "Das griechische Privatrecht auf rechtsvergleichender Grundlage" (Leipzig, vol. I, 1923).

M. deG. Verrall and *J. E. Harrison*, "Mythology and Monuments of Athens" (1890).



THE ROMAN LEGAL SYSTEM

VII

The Roman Legal System

1. Roman instinct for law and order—Territorial expansion.

(*I*) *Period of the Republic*

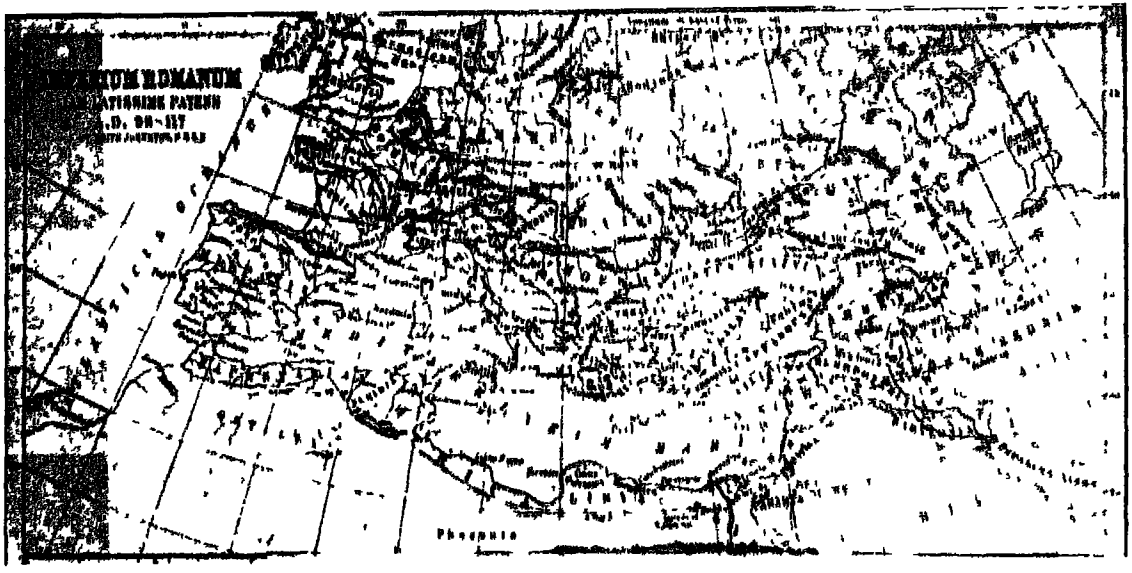
2. The Twelve Tables—Public inscription of laws—City ordinance for highway regulation, B. C. 45—Colonial city ordinance for court-procedure.
3. Earliest civil judgment, in a boundary suit.
4. Transactional instruments—Contract to build a gateway, B. C. 105—Deed from Dacia—Testament from Egypt.
5. Lay tribunals—The advocate—Tacitus on the status of advocates—Hortensius—Cicero—Essay on argumentation.
6. The court-houses—Jury trials.

(*II*) *Period of the Early Empire*

7. The praetor—Trial methods—Trial of Apollonius at Rome—Sophists' trial at Athens—Trial of Jesus at Jerusalem.
8. Development of a science of law.
9. Julian, the judge—The Perpetual Edict—Records of decisions.
10. Ulpian and Papinian, the counsellors—Opinion rendered by a counsellor—Case-law.
11. Quintilian, the teacher—Treatise on the Education of the Advocate.
12. Gaius, the jurist—The Institutes—Dawn of legal science.

(*III*) *Period of the Later Empire*

13. Justinian at Byzantium—Compilation of the Digest.
14. Italy occupied by the Germanic tribes—Disappearance of Roman Law in the West.



VII. 1. Map of the Roman Empire

VII

The Roman Legal System

THE earliest Roman settlers, beginning as simple immigrant colonists, were soon driven by their restless domineering energy to enlarge their domain. Gradually, by sheer conquest, their territories extended, during ten centuries, until the boundaries included almost the known world.[1] But amidst their victorious expansion, they carried with them their peculiar racial contribution to civilization, namely, a passion for law and order. By four centuries after their earliest juristic effort (the Twelve Tables), the Roman instinct for constitutional and legal ideas had produced a well-developed system. Their fine arts were devoted to the embellishment of their civic life, and a political career was the ambition of their ruling classes.[2] The Forum was now a teeming brilliant centre of politics and of justice. In that meeting-place were set up, on tablets of enduring bronze, their principal laws. The popular assemblies, which enacted the laws, met at one side of the Forum. The courts were held in the same central area. It was Augustus who perfected the architectural splendor of the

Forum; and it was his famous dying boast that he found Rome brick but he left it marble.[2a]

The system of Roman law can best be sketched in three stages,—the period of the Republic, the period of the early Empire, and the period of the later Empire.

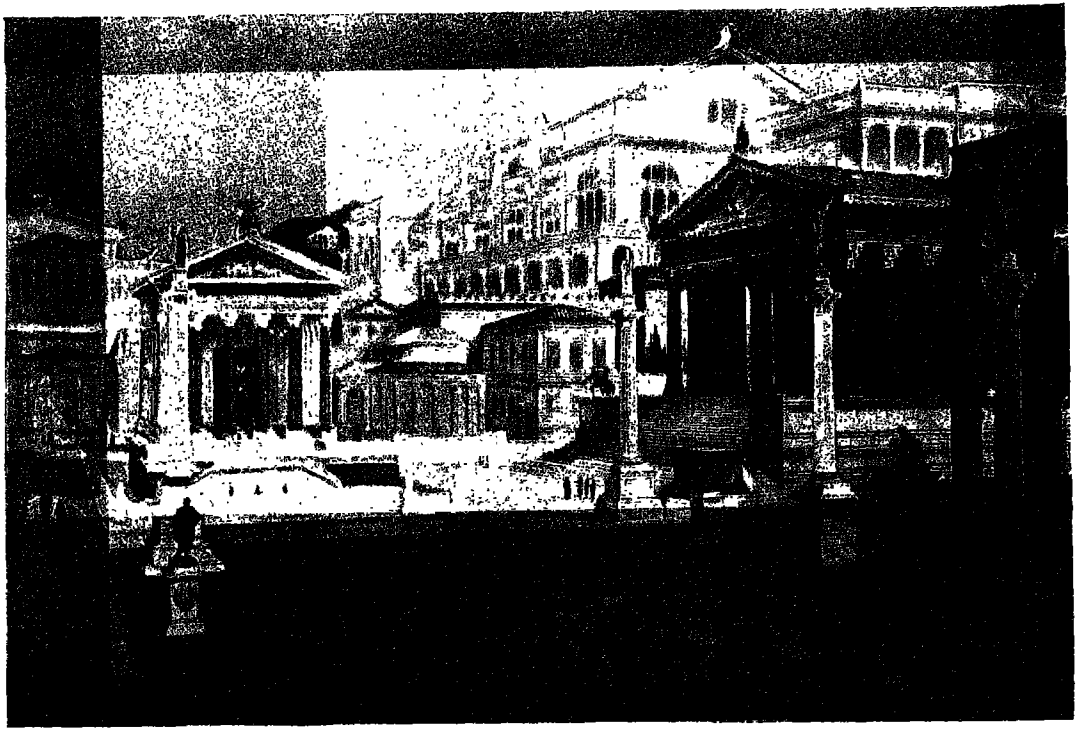
(I) THE PERIOD OF THE REPUBLIC

2. The earliest formulation of Roman law, known as the Twelve Tables, was a crude code of twelve concise chapters, dating about B. C. 400. The first Table, or chapter, restored in English, will exhibit its style:[a]

[*The Twelve Tables: Cap. I.*] "1. If a man call another to law, he shall go. If he go not, they shall witness it; then he shall be seized.



VII. 2—THE FORUM



VII. 2A—THE FORUM

"2. If he flee or evade, lay hands on him as he goes.

"3. If illness or age hinder, an ox-team shall be given him, but not a covered carriage, if he, defendant, does not wish.

"4. For a rich citizen the surety shall be a rich one; for a poor one, whoever offers shall be surety.

"5. [Missing.]

"6. Where they settle the matter, let it be told.

"7. If they settle not, they shall join issue in the assembly or in the Forum before midday, then they shall plead and prove, both being present.

"8. After midday, the cause shall be adjudged to the party present if the other has failed to appear.

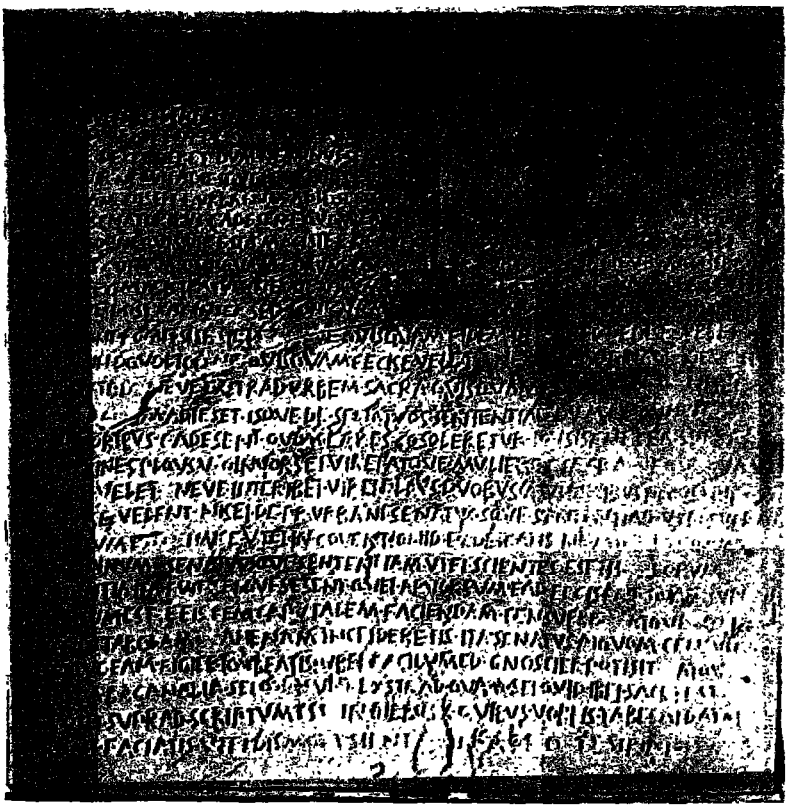
"9. If both attend, sunset shall be the last moment of the cause.

"10. [Missing.]"

This code (it will be observed) was chiefly procedural, —not moral, like the Hebrew Ten Commandments. "If a man call another to law, and he go not, he shall be seized"; and so on. But it was venerated as a classic tradition, and Cicero, four centuries later, wished that every schoolboy should learn its precepts by heart.

The Tables themselves have not been preserved, but we know their probable appearance from other early inscriptions, such as the Senate Resolution of B. C. 186 on the Festivals. Long after the introduction of wax tablets for writing, and of papyrus and parchment rolls for the recording of laws and literature, the Roman practice pre-

vailed of publicly setting up important laws on durable marble or bronze, in the form of pillars or placards, for general perusal.[3] Three thousand bronze plates, the records of such laws, were preserved on the Capitoline



VII. 3—Senate Resolution De Bacchanalibus, B. C. 186
One of the earliest inscriptions of Roman law now extant

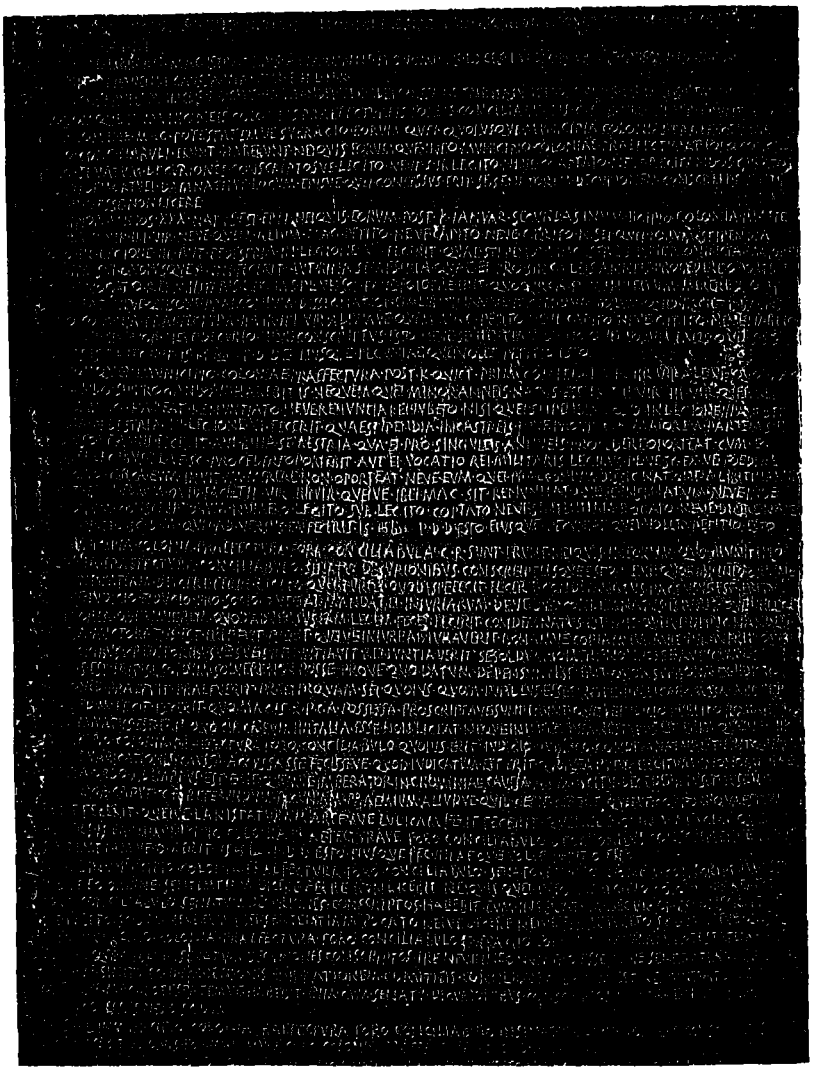
Hill in a special library. But these have all disappeared. Only a score or more, from other regions of the empire, have been unearthed by the archaeologists.

The Lex Julia Municipalis[a] is one of the best preserved; it is a fragment of a city code, dating from B. C. 45. Here are some provisions for the care of highways and regulation of traffic; their technique reveals the high order of administrative and legislative method already reached at Rome, and a notable advance over the models of Greek law:[b]

[*Lex Julia Municipalis: Highway Provisions.*] "Every aedile, to whom by this law any part of the city shall be assigned, shall be charged with repairing and maintaining the roads in all places within that part in such manner as this law shall direct.

"Where a road lies or shall lie between a sacred temple or a public building or a public space and a private tenement, it shall be the duty of the aedile in charge of that part of the city in which such sacred temple or public building or public space is situate, to contract for the maintenance of one-half of the said road.

"If any person, required by this law to maintain a public road in front of his tenement, shall fail to maintain such road to the satisfaction of the aedile concerned, then it shall be the duty of the aedile at whose discretion the road ought to be maintained to contract for the maintenance of such road. Furthermore, the said aedile, not less than ten days before he concludes the contract, shall have it publicly notified in the Forum in front of his tribunal, the description of the road to be contracted for, the day fixed for the contract, and the name of the person before whose tenement the road is situate. He shall further cause due notice to be given, to



VII. 4—Lex Julia Municipalis, B. C. 45
One tablet of a city code

the said person and to his agents at their respective houses, of his intention to contract for the road and of the day fixed for the contract. The said contract shall be concluded openly in the Forum by means of the urban quaestor or the presiding member of the treasury for the time being. The sum paid to the contractor for the said road, and the proportion of that sum falling on the several persons whose tenements abut on the road, according to the length and breadth of the road in front of their several tenements, the urban quaestor or the presiding member of the treasury for the time being shall cause to be entered in the public accounts of money owing to the people. Such sums he shall to the best of his honest judgment assess among the several parties as due to the person contracting for the maintenance of the said road. If any person so assessed shall, within the next thirty days after he or his agent is notified of the assessment, fail to pay the money or to satisfy the party to whom he is made liable, then such person shall be bound to pay in addition half the same sum to the party to whom he shall be liable, and for such purpose the magistrate to whom application shall be made in the matter shall assign a referee or referees in such manner as a referee or referees would be assigned in an action for money loaned.

"Where the maintenance of a road is by this law to be assigned to a contractor, the aedile responsible for the same shall contract for the maintenance of the said road through the urban quaestor, or the presiding member of the treasury for the time being, in such manner that the road shall be maintained to the satisfaction of the person who shall have had charge of the said contract. The urban quaestor, or the presiding member of the treasury for the time being, shall see that the sum agreed upon for the contract of each road shall, according to the terms of the agreement, be paid to the party contracting for that road or be credited as due to his heir.

"Any person, before whose tenement a footpath shall be situate, shall be required to keep such footpath fitly paved along its whole length where it abuts on the said tenement, with stones whole and

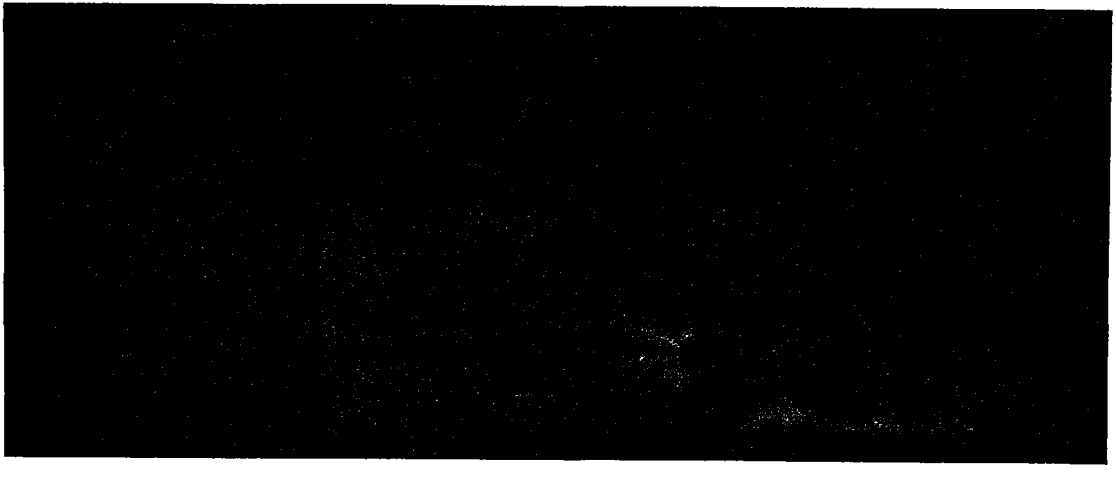
closely compacted, to the satisfaction of the aedile to whom by this law the charge of roads in that part shall appertain.

"In the roads which are or shall be within the city of Rome, or within the limit of continuous habitation, no person, after the first day of January next following, shall be allowed in the daytime, after sunrise or before the tenth hour of the day, to lead or drive any heavy wagon; except where it shall be requisite, for the purpose of building the sacred temples of the immortal gods or executing some public work, to draw or convey material into the city, or where, in pursuance of a contract for the demolition of buildings, it shall be requisite for public purposes to carry material out of the city or away from such places, and in cases and for objects for the which it shall be lawful for specified persons and for specified causes to lead or drive such wagons.

"On all days when the Vestal Virgins, the director of religious ceremonies, and the priests, shall be required to ride in wagons in the city by reason of the public religious ceremonies of the Roman people, or when wagons shall be required for a triumphal procession on the day fixed for such triumph, or for games which shall be publicly celebrated within the city of Rome, or within one mile of the city, or for the procession at the circus sports, for all such causes and on all such days it shall be lawful for wagons to be led or driven in the city in the daytime, anything in this law to the contrary notwithstanding.

"It shall be lawful for wagons, brought into the city by night, drawn by oxen or horses, if returning empty or conveying away refuse, to be in the city of Rome or within one mile of the city after sunrise in the first ten hours of the day, anything in this law to the contrary notwithstanding."

Another city code, for a colonial city in southern Spain (Lex Coloniae Genetivae Juliae), dating about B. C. 45, contained originally some one hundred and fifty sections.[5]



VII. 5—Lex Coloniae Genetivae Juliae
A city code, about B. C. 45, for a provincial city in Spain

VII. Roman Legal System

The following extracts illustrate, not only the style of legislative draftsmanship, but the determined practice of the Romans in carrying their own system of justice into remote conquered regions:[c]

[*Lex Coloniae Genetivae Juliae: Court Procedure.*] "XCIV. No person in this colony shall adjudicate or have jurisdiction, save the two magistrates, or a deputy left in charge by a magistrate, or an aedile, as provided for in this law. Nor shall any one by virtue of such imperium or power cause any person to adjudicate in the said colony, save those empowered so to do by this law.

"XCV. In the case of referees being assigned and failing to give judgment on the day commanded, the magistrate or deputy shall, when the cause in question comes on, order the said referees and the party concerned in the said cause to be present, fixing a certain day for their appearance, until the said cause shall be adjudicated, and he shall without prejudice cause adjudication in the said cause to be made within twenty days after referees were assigned and ordered to adjudicate. And he shall cause public notice to be served on the witnesses to the said cause, not exceeding twenty persons, being colonists or resident aliens, selected at will by the person who shall conduct the cause. And he shall take measures that the persons on whom such notice is served, and whose names are included in the list of witnesses, shall be present at the said trial. And he shall without prejudice cause any person, who shall know or have heard aught of the matters under inquiry, to declare his evidence, after taking oath, provided that not more than twenty persons in all be compelled to give evidence at any one trial.

"No person shall be compelled to give evidence against his will who is related to the party concerned in the said cause, as father-in-law, son-in-law, step-father, step-son, patron, freedman, cousin, or any nearer connexion by blood or affinity. In the case of the magis-

trate or deputy, who shall make such claim for the colonists, failing to be present, if such absence shall be due to serious illness or to business connected with bail or jurisdiction or a sacrifice or a funeral in his household or purificatory rites ensuing thereon, or if he shall be detained by some magistracy or power conferred by the Roman people, then it is not the intention of this law that in the absence from the court of the person conducting the matter, the allotment or rejection of the referees shall proceed or the matter be adjudicated.

"In the case of a private person making the claim, and failing to be present, on the proper day for the holding of the court, and not having been excused when the case shall come on at the discretion of the magistrate or deputy, on the ground that one of the aforesaid causes of absence had arisen, viz., serious illness or business connected with bail or jurisdiction or a sacrifice or a funeral in his household or purificatory rites ensuing thereon, or that he is prevented from attending by a magistracy or power conferred by the Roman people; then no action shall lie in respect to matters for which an inquiry is provided by this law. And in respect to such matter, the law shall take its course, and the matter remain exactly as though no jurors had been elected and no referees assigned for the said matter.

"CII. No magistrate, holding an inquiry or conducting a trial in accordance with this law, shall, unless such trial is by this law bound to be concluded in one day, hold the said inquiry or conduct the said trial before the first or after the eleventh hour of the day. The said magistrate shall also, in respect to the several accusers, give to the chief accuser the privilege of making his accusation for four hours, and to every subordinate accuser for two hours. In the case of an accuser conceding a portion of his time to another person, he shall give to the said person, to whom such time is conceded, so much the longer time for speaking. He shall likewise give to the person, who shall have conceded a portion of his time to another, so much the shorter time for speaking. For whatsoever total number

of hours the whole number of accusers shall have the privilege of speaking in each several proceeding, he shall give to the defendant or the person pleading for the defendant the privilege of speaking for twice the said number of hours in each proceeding."

3. The earliest recorded civil judgment now extant dates from B. C. 117.[c] It occurs on a bronze tablet, found near Genoa, and represents a formal judgment of arbitration between two local tribes contending over the boundaries of their lands. The record describes the boundaries in language quite comparable with the best technical style of New England conveyancers in our own day:[d]

[*Genoa Judgment*, B. C. 117.] [1] "Quintus and Marcus Minutius, sons of Quintus, clan of Rufus, have taken jurisdiction of the issues between the Genoese and the Viturians in the present cause, and in their presence have reached a decision on the issues and have made a finding as to the title to the land and as to its boundaries, and have directed that the bounds be run and that land-marks be set up, and, when this was done, ordered the parties to come to Rome and at Rome in their presence gave judgment, pursuant to a Senate resolution, on the Ides of December, in the consulate of Lucius Cecilius, son of Quintus, and of Quintus Mucius, son of Quintus, as follows:

[2] "The farm-land at Castellus of the Viturii Langenses is the individual property of the Viturians, their heirs and assigns, not subject to tax. It is bounded as follows: At the mouth of the brook which starts from the spring at Manicelo, and at the point where it meets the river Ede, there is a boundary-stone; thence up along the river till it meets the river Lemuri; thence up along the river Lemuri to the brook Cumberanea; thence up along the bank of the



VII. 6—THE JUDGMENT AT GENOA
This dates from B. C. 117, and is the earliest original record extant of a civil judgment in Roman law

Cumberanea to the Ceptiema Valley; there are here two boundary-stones at the Postumia road: thence on the straight line drawn through these stones to the brook Vendupale; from the brook Vendupale to the river Neviasca; thence down along the river Neviasca till it meets the Procobera; thence down along the Procobera to the point where the brook Vinelasca unites with it; there is here a boundary-stone, at the Postumia road, and another beyond the road; from the boundary-stone beyond the road in a straight line to the spring at Manicelo; thence down along the brook which starts from the spring at Manicelo, to the boundary-stone at the river Ede the point of beginning.

[3] "As to the public land belonging to the Viturians, it is adjudged that the boundaries are as follows: At the point of confluence of the Ede and the Procobera there is a boundary-stone marked I; thence up along the river Ede to the foot of the Lemorino hill, where there is a boundary-stone marked II; thence up to the Lemorino ridge, meeting a boundary-stone at the Procavo hill marked IV; thence up along the ridge to the summit of the Lemorino hill, to where there is a boundary-stone marked V; thence continuing by the ridge to the Castellus known as Alin, where there is a boundary-stone marked VI; thence traveling by the ridge on the Joventius hill to where there is a boundary-stone marked VII; thence following the ridge on the Apennine hill known as Boplus, to where there is a boundary-stone marked VIII; from the Apennine, following the ridge to the Tuledo hill, to where there is a boundary-stone marked IX; thence down the slope along the river Veraglasca to the foot of the Berigiema hill, to a boundary-stone marked X; thence by the slope up to the hill Prenico, to a boundary-stone marked XI; thence by the slope descending to the river Tutelasca, to a boundary-stone marked XII; thence up the slope of Blustimelus to the hill Claxelus, to a boundary-stone marked XIII; thence descending to the spring Lebriemelus, to a boundary-stone marked XIV; thence down along the brook Eniseca to the river Procobera, to a boundary-stone

marked XV; thence down along the river Procobera to the point of confluence of the rivers Ede and Procobera at the point of beginning.

[4] "Of the foregoing land, adjudged to be public land, the Viturii of Castellus Langascus shall have the lawful possession and enjoyment. For this land the Viturii Langenses shall pay 400 veiturii annually in rental to the treasury of Genoa. If they shall fail to pay this sum or to satisfy the Genoese in some other manner acceptable to the latter, and provided the Genoese shall not be the cause of the delay, the Langenses shall be bound to deliver each such year to the treasury of Genoa the twentieth part of the grain produced on that land and the sixth part of the wine.

[5] "Whoever whether Genoese or Viturian possesses land within these boundaries shall be confirmed in the possession and enjoyment thereof, provided his possession dates at least from the kalends of the sixth month of the consulate of L. Cecilius Metellus and of Quintus Mucius [B. C. 117], and those persons who have the enjoyment of such possessions shall pay to the Langenses a ratable tax equally with all other Langenses who shall be in the possession and enjoyment of said land. Other than these no person shall hold any part of the said land without the consent of a majority of the Viturii Langenses, provided that none other than Genoese or Viturians shall be allowed as settlers therein. And whoever fails to abide by the decision of the majority of the Viturii Langenses shall not be allowed to remain in possession and enjoyment of said land.

[6] "As to the portion of said land which is common land, it shall be lawful for the Genoese and the Viturians to pasture their herds as in the remaining land of Genoa allotted for public pasture; no one shall impede or resort to force to prevent it, nor shall any one impede from taking wood and materials.

[7] "The first instalment of tax due from the Viturii Langenses shall be paid on the kalends of January of the second year, and for

those lands which shall have been enjoyed in use prior to the kalends of January they shall not be bound to pay any tax.

[8] "As to meadowland which in the [current] year of the consulate of L. Cecilius and Quintus Mucius shall be ripe for cutting hay, located in the public lands, whether in the possession of the Viturii Langenses, or of the Odiati or the Dectunini or the Cavaturini or the Mentovini, no one shall be allowed to cut hay nor to put animals to pasture therein, nor to make use of it otherwise, without the consent of the Langenses, the Odiati, the Dectunini, the Cavaturini, or the Mentovini, respectively for the tracts possessed by each of them. If the Langenses, the Odiati, the Dectunini, the Cavaturini or the Mentovini, shall wish to establish new meadows in such land, or to close them, or to cut the hay, they shall be at liberty to do this on condition that they make no greater extension of meadowland beyond the area had and enjoyed in the summer last past.

[9] "As to the Viturii who in the dispute with the Genoese were prosecuted and sentenced for assault, if any one of them is still in prison for such offence, it is held that the Genoese shall absolve and set him at liberty. Prior to the ensuing Ides of the sixth month, if on this ground there is any complaint of injustice, let them appear before us on any day not assigned to other cases nor to public functions.

"[Signed]

"[Representative for Genoa] Mocus Meticanius, son of Metico;

"[Representative for Viturii] Plaucus, son of Pelion of Pelius."

This document from Genoa is a report of the local representatives embodying the terms of the arbitrators' judgment. But the records themselves of the courts of this period, showing the forms of entry used—whether of

Senate or Assembly or praetor or special courts—have all disappeared.

4. The records of legal transactions between individuals, in classic times, have virtually all perished. But it is certain that the Romans (profiting of course from their contact with Greek commerce and literature) used well-developed forms of conveyancing. There is extant a city ordinance of B. C. 105,[7] giving specifications for a contract to build a gateway in a wall abutting on a highway in the town of Puteolis, and in this contract are revealed all the expedients of long experience and careful draftsmanship which we moderns are accustomed to expect in such transactions.[8] The specifications are so complete that archaeologists have been able to restore the entire structure in detailed design:[7a]

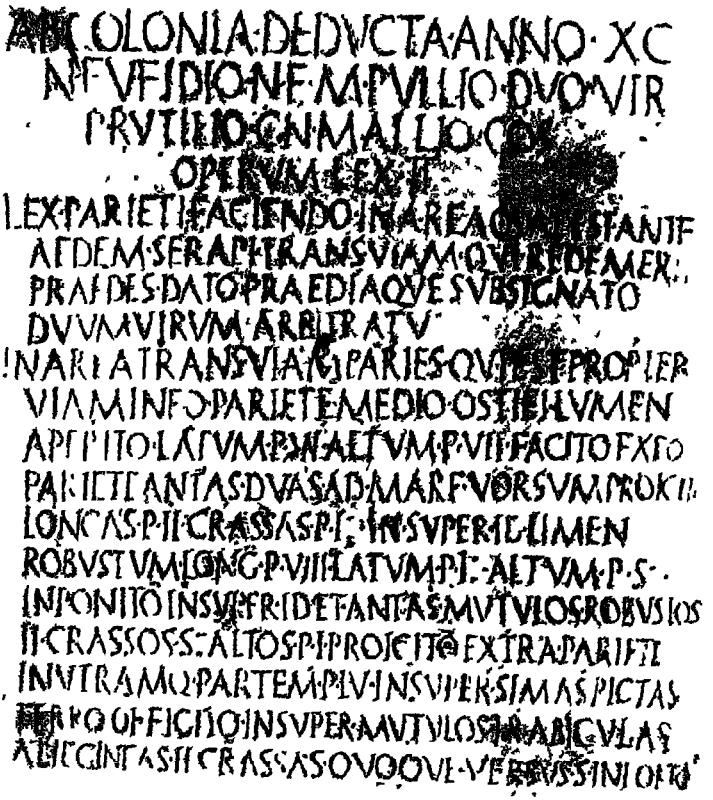
[*Contract to Build a Gateway.*]

[Date.] "In the ninetieth year since the founding of the Colony, under the magistrate Numerius Fufidius, son of Numerius, and Marcus Pullius and the consuls Publius Rutilius and Gnaeus Mallius.

Of Public Works, Lex No. 2

[Subject.] "Proclamation for the construction of a wall in the court in front of the temple of Sarapis across the street. Whoever shall be awarded the contract shall furnish bondsmen, secured by real estate, to the satisfaction of the magistrates.

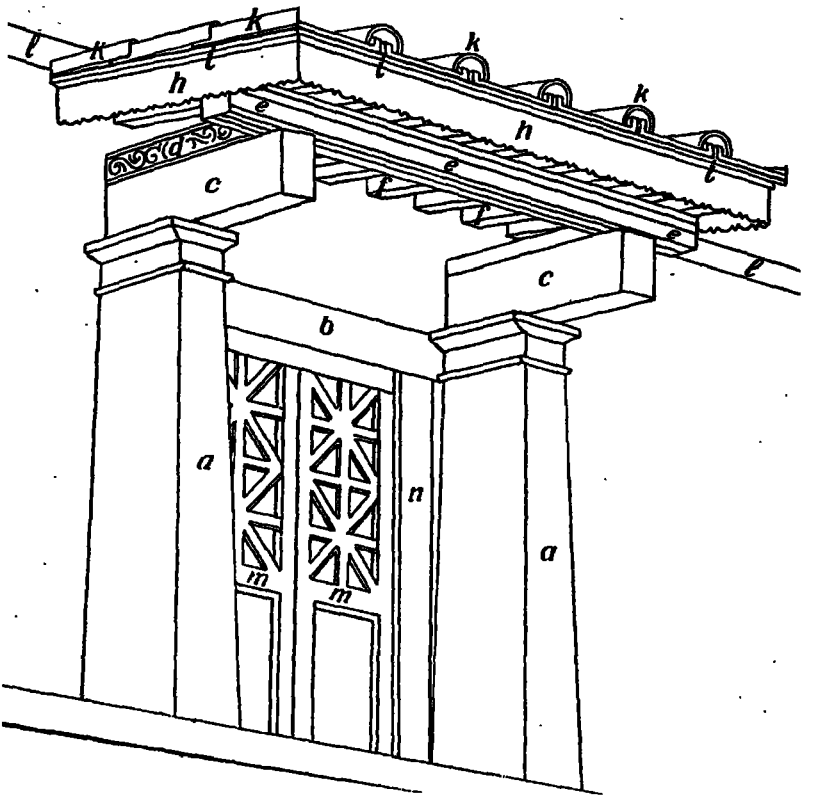
[Specifications.] "In the court across the street, where now stands a wall near the street, in said wall at the middle point, he



VII 7—City Contract for Building a Gateway

This inscription, "Lex parieti faciendo", contains elaborate specifications for the contractor's undertaking, similar to those of the present day

shall open a gate-way, and shall make this 6 feet wide, and 7 feet high. From said wall on both sides of the gate he shall make two pilasters, and he shall make the two pilasters on the side towards



VII. 7.1—RECONSTRUCTED DESIGN FOR THE GATEWAY, DEDUCED FROM THE SPECIFICATIONS

the sea project 2 feet long by 1¼ feet thick. Over said gate he shall place a lintel of oak 8 feet long, 1¼ feet wide, and ¾ feet high. Over this lintel and the pilasters he shall be required to lay two beams of oak 8 inches thick, 1 foot high, and projecting from the outer and the inner side of the wall 4 feet. To this he shall attach

with iron nails a decorated moulding. Over said projecting beams he shall place two small transverse beams of fir, 6 inches square, and shall fasten these with iron nails. He shall thereon lay rafters of cut fir, 4 inches by 4 inches, and said rafters he shall space not farther than 9 inches apart. On the rafters he shall place sheathing of fir, made of foot timber. A facing board of fir, 9 inches by ½ inch, with ogee moulding, he shall attach, and fasten the same with flat-headed iron nails.

"The said gate-way he shall cover with tile roofing, using six pieces in each row reckoning both sides of the gate, laid in squares. All the border tiles shall be fastened to the facing board with iron nails; and over the upper row of tiles as a ridge piece he shall place the coping of the wall.

"The said contractor shall make two latticed doors, with winter-oak door posts, shall set them up, fit the lock, and finish them with pitch, after the pattern of the doors at the Temple of Honor.

"Likewise the wall which forms the outer boundary of the court away from the street, said wall with its coping he shall make 10 feet high. Likewise the door which now serves as an entrance in the court, and the windows in the same wall opening upon the court, he shall be required to wall up. Furthermore, upon the first wall aforesaid, standing now adjacent to the street, he shall place a continuous coping.

"All these walls and their coping throughout, where not surfaced, he shall dress with a mortar of lime and sand, smoothed down, and then cover with properly prepared white-wash. In the mortar which shall be prepared for the wall, he shall use in three parts of Puteolan earth one part of slaked lime. And in the structure of the wall, he shall neither build in any stone larger than shall by dry measure weigh 15 pounds, nor make the corner stones higher than 4½ inch.

"The ground he shall clear of all debris after the work.

[The Area Sacra.] "Furthermore, the shrines, altars, and statues which are now in the campus, and which shall be later designated to him, all these he shall remove, carry to the enclosed court, arrange, and set up in such position as shall have been designated according to the judgment of the two mayors.

[Conditions of Approval.] "All the aforesaid work the contractor shall do according to the judgment of the two mayors and of their associates in the council of Puteolis, provided not fewer than twenty of them shall be present when this matter is considered. Whatever as many as twenty of them shall under oath and by majority vote approve, shall stand approved; whatever they shall reject, shall stand rejected.

[Time Limit.] "Time for the completion of the work: The first day of November ensuing.

[Payment.] "Time of payment of money: One half shall be paid down as soon as the bonds secured by real estate shall have been executed: the other half upon the completion and acceptance of the work.

[Signed.] "C. Blossius, son of Quintus, [undertaking the contract for] 1500 sesterces, [and offering] security to that amount.

"Q. Fuficius, son of Quintus

Cn. Tetteius, son of Quintus

C. Granius, son of Gaius

Ti. Crassicius } Guarantors"

But though the transactional instruments on Italian soil, in classic times, remain in the realm of conjecture only, modern archaeology has discovered some invaluable examples of later practice,—chiefly from the papyri of Egypt, where Roman law for several centuries after Caesar's conquest was administered by Roman judges in

the Greek language, and also from discoveries in the Carpathian hills, the region conquered by Trajan.

Here is a simple deed of realty, in Dacia, from A. D. 150:[f]

[*Deed of Sale of Realty, A. D. 150.*] "Andueia Batonis has bought and taken title of the half part of a house, being the right half on the front, situated in Greater Alburnus ward of the town Pirustae, bounded by the houses of Plator Acceptianus and Ingenuus Callistus, for three hundred denarii from Veturius Valens. The aforesaid half part of the house, together with its fences, enclosures, approaches, walls, and windows, being sound and in prime condition, the grantee is to hold lawfully and freely. And if any one shall evict the grantee from the said house or any part thereof so that the said Andueia Batonis or any of his assigns shall suffer in the free and lawful possession and enjoyment thereof, then for so much of such full and free possession as shall be diminished Veturius Valens has promised to pay on sworn demand of Andueia Batonis a ratable compensation. And the price three hundred denarii for the said half part of the house Veturius Valens acknowledges that he has received and holds from Andueia Batonis. And it is further agreed between the parties that Veturius Valens shall pay the taxes due on the said house up to the next assessment.—Done at Greater Alburnus May 6th, in the consulship of Quintillus and Priscus. Attest: L. Vasidius Victor, T. Fl. Felix, M. Lucanus Melior, Plator Carpus, T. Aurelius Priscus, Batonis Anneus; Veturius Valens, grantor."

And here is a Roman's will of A. D. 189, executed in Greek, in Egypt, but certified in a Latin copy:[g]

[*Will, A. D. 189.*] "Gaius Longinus Castor, a veteran honorably discharged from the praetorian fleet at Misenum, has made his will. I direct that my slave Marcella, being over 30 years of age,

and my slave Cleopatra, being over 30 years of age, be freed, and that each inherit an equal part of my estate Let all other heirs be disinherited. Let my heirs take possession each of her share when But if the said Marcella suffer the fate of mortals, then I will that her share of the estate go to Sarapion and Socrates and Longus. Likewise for Cleopatra, I will that her share go to Nilus. Whoever might be my natural heir shall be bound, under penalty, to give, do and perform all the provisions here written in this my will and shall hold the estate in trust for that purpose. My slave Sarapias, daughter of my freedwoman Cleopatra, is to be freed, to whom I give and bequeath five tracts of arable land which I hold in the county of Caranis at the place known as Struthus; likewise, one arable tract and a fourth part of the lowland; likewise a third part of my house and a third part of that house which I bought heretofore from Prapetheutes mother of Thaseutis; likewise a third part of the palm-grove which I own, near the canal known as the old canal. I will that my body shall be prepared and buried with due religious rites at the expense of my heirs. If I shall hereafter have left any writing in my own hand [as a codicil] I hereby declare it to be good and valid. This will was made without fraud. The 'family share' of this will Julius Petronianus has bought for one sestertius, witness Gaius Lucretius Saturnilus.

"Chief witness to this will, Marcus Sempronius Heraclianus.

"The will was made in the county of Caranis, district of Arsinoe, October 18th, consulship of the two Silani, in the 10th year of the Emperor. . . [giving his titles]. If I shall have left other writings in my own hand, I declare them valid.

"Opened [after the testator's death] in the city of Arsinoe in the Forum of Augustus at the office of collector of taxes on estates and privileges on February 22 . . [dating by reign, etc.]. Other [witnesses'] signatures Gaius Longinus Aquilas (who acknowledged), Julius Volusius, Marcus Antistius Petronianus, Julius Gemellus a veteran.

[Two pages of codicil.] "I Gaius Longinus Castor a veteran honorably discharged from the praetorian fleet at Misenum have made this codicil. Marcus Sempronius Heraclianus my esteemed friend, I make executor on his own recognizance. To my cousin Julius Serenus I give and bequeath four sesterces. I have written this with my own hand on the 7th of February. Signed (as witnesses) by Longinus Aquilas and Valerius Priscus. Signers also Gaius Longinus Aquilas, Julius Philoxenus, Gaius Lucretius Saturnilus, Gaius Longinus Castor, Julius Gemellus a veteran.—Opened and acknowledged on the same day that the will was opened. Gaius Lucius Geminianus, a jurisconsult of Rome. I have made this said copy and declare it to be a correct copy of the original will."

5. This advanced stage of law and practice had of course been developed by a legal profession.

And yet, during the Republic, the Roman people had not essentially gone beyond the stage reached by the Greeks. Justice was not yet sharply distinguished from general politics; nor were the juristic functions of the legal profession fully developed.

The jurisconsult—the thinker and adviser solely upon questions of law—was as yet in an early stage of development. In this period, he was more like the "law-speaker" of the Germanic peoples,—the repository of the sacred ancestral rites and civic traditions. His esoteric knowledge was at the disposal of all who might consult him. He was often an augur or a pontifex. Cicero, for example, when he sought to prepare as an advocate, attached himself first to Quintus Scaevola, the augur, and

after his death to the other Scaevola, the pontifex maximus, an even more famous man, to absorb from their utterances the traditions of the law. Gibbon's pen-picture of the early jurisconsult is still worth recalling:[h]

"This occult science of the words and actions of law was the inheritance of the pontiffs and patricians. Like the Chaldaean astrologers, they announced to their clients the days of business and repose On the public days of market or assembly the masters of the art were seen walking in the Forum, ready to impart the needful advice to the meanest of their fellow-citizens, from whose votes, on a future occasion, they might solicit a grateful return. As their years and honours increased, they seated themselves at home on a chair or throne, to expect, with patient gravity, the visits of their clients, who at the dawn of day, from the town and country, began to thunder at their door. The duties of social life and the incidents of judicial proceeding were the ordinary subject of these consultations, and the verbal or written opinion of the jurisconsults was framed according to the rules of prudence and law. The youths of their own order and family were permitted to listen; their children enjoyed the benefit of more private lessons; and the Mucian race was long renowned for the hereditary knowledge of the civil law."

It was the orator, or advocate, who was the chief personage in this period,—naturally enough, because the tribunals whose decisions he courted were chiefly popular ones, composed of laymen judging alike on law and facts.

Tradition at Rome looked upon advocacy before the public assemblies as a part of the privilege and duty of the patrician class; they were to use their influence, in legal

or political trouble, on behalf of their numerous clan-followers and friends. The latter were the "clients"; the former the "patrons". Hence the sons of the patricians—like the Norman barons after the Conquest—might choose this career of "patron" (or "orator") as honorably as the military career. And the introduction to the Forum (analogous to the "call to the bar") was a most important epoch of life; the youth donned the "man's toga", proceeded to the Forum with a company of his friends and was there formally introduced, by some distinguished citizen, to the career of an orator. He would then attach himself to some professional teacher of speech, and would also frequent the chambers of some jurisconsult and listen to his opinions.

But the orator's knowledge of law was secondary to his oratorical art. Cicero himself disparaged the importance of the former attainment; "if you put me on my mettle", he said, in the speech for Murena, "busy as I am, I will in three days declare myself a jurisconsult". Of Servius Sulpicius, a contemporary of Cicero's, and second only to Cicero as an advocate, the following anecdote is recorded by Pomponius:[1] Servius, preparing to argue a case, came to ask the law from the famous Scaevola (above-mentioned), but could not quite comprehend Scaevola's answer; he asked him again; was answered

again, and still could not understand; whereon Scaevola indignantly censured his effrontery: "It is shameful for a patrician, a man of good family, who argues causes, not to be able to understand the very law that forms his vocation"; and Servius, stung by this reproach, then proceeded to study the law in earnest.

In this Republican period of Rome, then (as in Athens) the orator, or advocate, is the chief and typical figure of the legal profession; there is no sharp line between the advocate and the statesman; the jurisconsult is in the background, and the advocate receives the highest public honor.

The outstanding eminence of the advocate in Roman life, and the pleasures of a successful ambition in that field, were feelingly described by Tacitus, who had himself known success at the bar: in his "Dialogue on Orators", the speaker is Marcus Afer, an eloquent Gaul, a distinguished leader of the bar:

[*Tacitus, on the Status of Advocates.*] "What greater gratification can there be for a free-born gentleman, fashioned by nature for lofty pleasures, than to see his house filled to the door every day with a company of persons of the highest rank, and to know that he owes this compliment not to his wealth, not to his childless condition, not to the fact that he holds some office or other, but to himself? Why, people who have no one to leave their money to, and the rich and the great, are always coming, young and poor though he may be, to get him to take up their own cases or those of their friends. Can

vast wealth or great power bring with it any satisfaction comparable to the sight of grave and reverend seniors, men with the whole world at their feet, freely owning that, though in circumstances of the utmost affluence, they lack the greatest gift of all? Just look, again, at the imposing retinue of clients that follows you when you leave your house! What a brave show you make out-of-doors! What an amount of deference is paid to you in the law courts! Are there any whose names are dinned at an earlier age by parents into their children's ears? Are there any to whom the plain man in the street, our citizens in their working-clothes, more frequently point as they pass by, saying, 'There goes So-and-So'? Visitors also and non-residents, as soon as they set foot in the capital, ask for the men of whom in their country-towns and colonies they have already heard so much, and are all agog to make them out.

"Let me make this avowal about my own case. The day on which I was invested with the robe of a senator, or that on which I was elected quaestor, or tribune, or praetor, though a man of new birth and a native of a community which is not at all popular at Rome,—such days have been in no greater degree red-letter days for me than those on which I enjoy the opportunity, to the modest extent of my poor ability as a speaker, of securing an acquittal in a criminal trial, or of pleading some case successfully before the centumviral court, or of undertaking the defence of some redoubtable freedman or imperial agent in the emperor's presence-chamber. Then it is that I feel I am rising above the level of a tribune, a praetor, or even a consul, and that I possess an asset which, unless it comes unbidden, cannot either be conferred by letters-patent or follow in the train of popular favour.

"Why, where is there a profession whose name and fame are to be compared with renown in oratory? What class of men enjoys greater prestige here in Rome?"



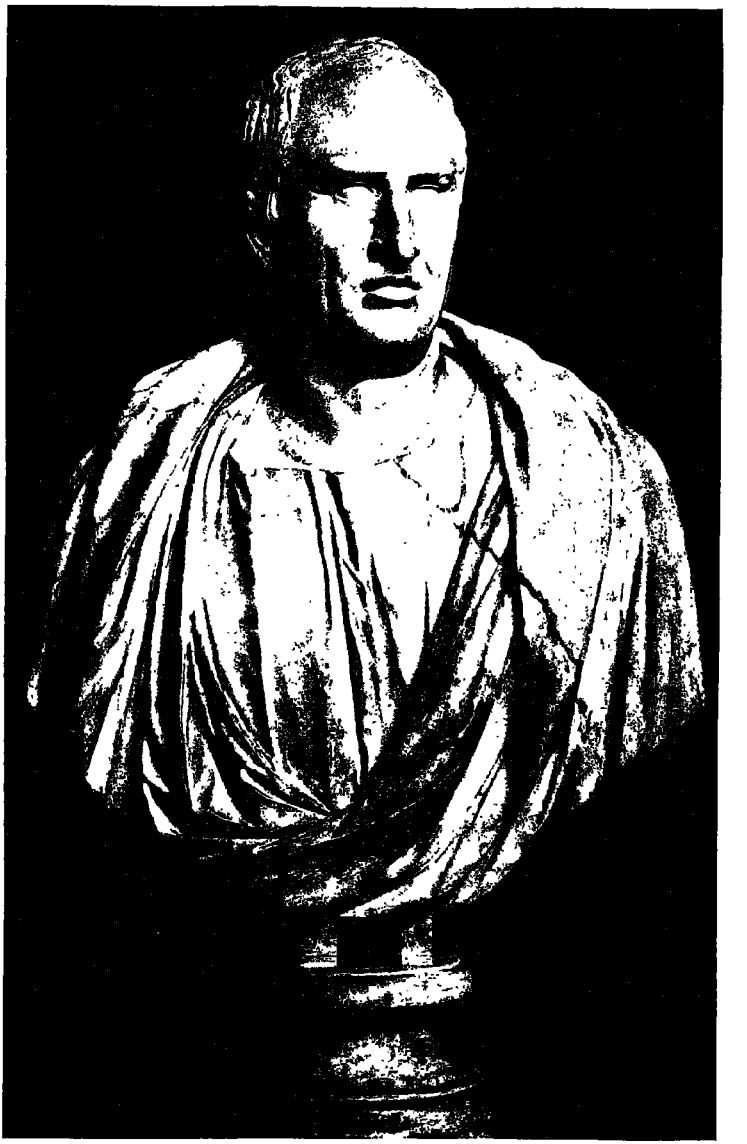
VII. 8—HORTENSIUS THE ADVOCATE

It is said that he never used notes for his own speeches, nor took notes of his adversary's

The names of these famous advocates begin to be noted as far back as B. C. 200. In the last century of the Republic the esteemed Roman model of his day was Hortensius.[8] He pleaded his first cause at the age of nineteen; and his natural aptitude for his art was so great that he is said never to have had to take notes of his opponent's speech nor to use notes for his own.

But the name of Cicero[9] comes down to us, for his classical style, as the typical Roman advocate for all time. His range of learning in philosophy, in logic, and in political science, has through him enhanced the dignity of the entire legal profession. His speeches against the traitor Catiline, in the Senate, "Quousque tandem abutere, Catilina, patientia nostra? O tempora! O mores!" have been read by millions of youths in successive ages;[10] and he is one of the two or three personages of legal literature whose works have become and remained school books in all countries and epochs.

As an illustration of Cicero's methods, let us take, not a speech (for his speeches cannot be judged by short extracts), but one of his essays on the art of speech. The following passage, from his essay on Topics (i. e. materials for argumentation), illustrates how thoroughly he had worked out his logic in its application to the everyday



VII. 9—CICERO

materials of litigious debate; for he was fond of saying that no one could be a good advocate without logic:[k]

[*Cicero's Essay on Argumentation.*] "When we wish to examine any argument, we ought to know the Topics,—for so they are called by Aristotle, being, as it were, sources from which arguments are derived. Therefore we may give as a definition, that a Topic is the source of an argument, and that an argument is a reason which causes men to believe a thing which would otherwise be doubtful

"Arguments are also derived from things which bear some kind of relation to that which is the object of discussion. But this kind is distributed under many heads; for we call some connected with one another either by nature, or by their form, or by their resemblance to one another, or by their differences, or by their contrariety to one another, or by adjuncts, or by their antecedents, or by their consequents, or by what is opposed to each of them, or by causes, or by effects, or by a comparison with what is greater, or equal, or less

"An argument is derived from the species, which we may sometimes name, in order that it may be more clearly understood; in this manner: 'If the money was bequeathed to Fabia by her husband, on the supposition that she was the mother of his family; then, if she was not his wife, nothing is due to her.' For the wife is the genus: there are two kinds of wife; one being those mothers of a family who become wives by coemption; the other kind are those which are only considered wives: and as Fabia was one of those last, it appears that nothing was bequeathed to her.

"An argument is derived from similarity in this way: 'If those houses have fallen down, or got into disrepair, a life-interest in which is bequeathed to someone, the heir is not bound to restore or to repair them, any more than he is bound to replace a slave, if a slave, a life-interest in whom has been bequeathed to someone, has died.'



VII. 10—Cicero's Speech against Catiline in the Senate
This painting now decorates the wall of the modern Senate House at Rome

5. *Legal Profession*

"An argument is derived from difference thus: 'It does not follow, if a man has bequeathed to his wife all the money which belonged to him, that therefore he bequeathed all which was down in his books as due to him; for there is a great difference whether the money is laid up in his strong box, or set down as due in his accounts.'

"An argument is derived from contraries thus: 'That woman to whom her husband has left a life-interest in all his property, has no right, if his cellars of wine and oil are left full, to think that they belong to her; for the use of them is what has been bequeathed to her, and not the misuse: and they are contrary to one another.'

"An argument is derived from adjuncts thus: 'If a woman has made a will who has never given up her liberty by marriage, it does not appear that possession ought to be given by the edict of the praetor to the legatee under that will; for it is added that in that case possession would seem proper to be given by that same edict under the wills of slaves, or exiles, or infants.'

"Arguments are derived from antecedents, and consequents, and contradictories, in this way: From antecedents: 'If a divorce has been caused by the fault of the husband, although the woman has demanded it still she is not bound to leave any of her dowry for her children.'

"From consequents: 'If a woman, having married a man with whom she had no right of intermarriage, has demanded a divorce, since the children who have been born do not follow their father, the father has no right to keep back any portion of the woman's dowry.'

"From contradictories: 'If the head of a family has left to his wife in reversion after his son the life-interest in the female slaves, and has made no mention of any other reversionary heir, if the son dies, the woman shall not lose her life-interest. For that which has once been given to any one by will cannot be taken away from the legatee to whom it has been given without his consent; for it is a

contradiction for any one to have a right to receive a thing, and yet to be forced to give it up against his will.'

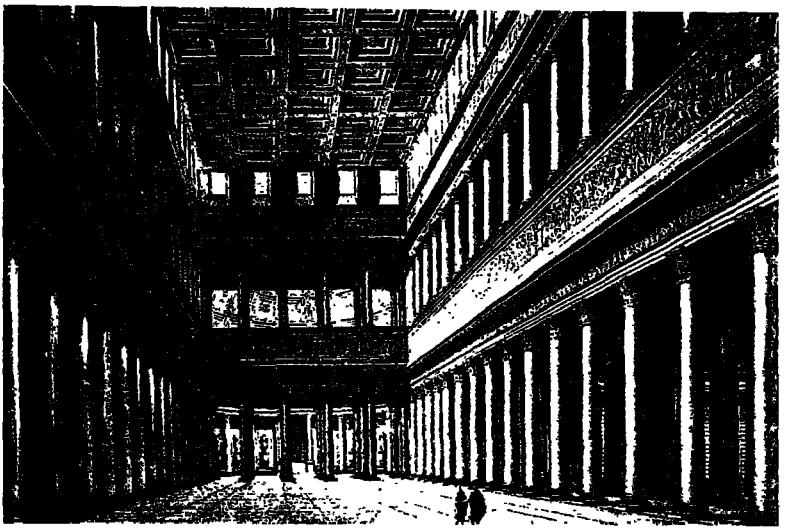
"An argument is derived from efficient causes, in this way: 'All men have a right to add to a common party wall a wall extending its whole length, either solid or on arches; but if any one in demolishing the common wall should promise to pay for any damages which may arise from his action, he will not be bound to pay for any damage sustained or caused by such arches: for the damage has been done, not by the party which demolished the common wall, but in consequence of some fault in the work, which was built in such a manner as to be unable to support itself.'

"An argument is derived from what has been done, in this way: 'When a woman becomes the wife of a man, everything which has belonged to the woman now becomes the property of the husband under the name of dowry.'.

"By these Topics, then, which have been explained, a means of discovering and proving every sort of argument is supplied, as if they were elements of argument."

6. A court of justice at Rome was termed Basilica,—oddly enough, from a Greek word of royalty. These spacious edifices had become a prominent feature of Rome's city architecture.[11] Four of these court-houses,—the Julian, the Emilian, the Domitian, and the Constantine Basilicas—were in or near the main Forum, close by the meeting-place of the electoral assembly. They were the first secular buildings devoted to justice in any legal system. The courts were so thronged with judicial business that twenty were erected successively within five centuries, in the capital city alone; and remnants of other

6. Court-Houses



VII. 11—The Ulpian Court-House
Twenty of these court-houses, in all, were erected in Rome

Roman court-houses can still be seen in any country of Europe, Asia, or Africa where Roman government reached. Important criminal or political trials might be held in the Forum, in the open air; and at the trial of Milo (made famous by Cicero), which involved great factional feeling, an immense multitude, guarded by soldiers, packed the Forum, and vast numbers crowded roofs and windows in every adjacent spot, to follow the proceedings.

There were various tribunals at Rome. In the early days of the Republic the entire popular assembly might sit in judgment (and there came to be sixty thousand

qualified to vote). But, as at Athens, this purely democratic mingling of politics and justice became impracticable, and various smaller bodies were organized for the decision of different classes of cases. Sometimes—for what we should call impeachment cases—that body was the Senate or other General Assembly; sometimes a large special jury selected from a general panel (in the trial of Milo, fifty-one jurors voted); sometimes a smaller body of assessors or referees, assisting the praetor, who received the pleadings,—and this usually in what we should call ordinary civil suits.

It cannot be gainsaid that in the Republican period the dominant spirit had not progressed far beyond that of Greek justice. These lay-courts were judges both of law and fact; there was little judicial direction of law, and no appeal of law. The tribunal was final, in its mingling of law and fact, justice and clemency, logic and popular emotion.

(II) The Period of the Early Empire

7. This method of uncontrolled popular justice would hardly have developed a science of law, any more than it did in Greece. But, as this period closes, the professional judge and jurist come to the front, and the jury-advocate ceases to be the typical figure.



VII. 12 CONSTANTINE COURT-HOUSE

The praetor sat in his chair at the apse, and the throng of lawyers, witnesses, clients, and attendants gathered in front of him

7. *Trial Methods*

Under the emperors, lay juries disappeared; and most trials, both civil and criminal, took place under a single judge. As a trial judge, the praetor united in himself all the powers that we distribute between civil and criminal tribunals, common law and equity courts. The praetor, who was of senatorial rank, sat in his chair at the apse or chancel of the basilica; and the throng of lawyers, clients, witnesses and bailiffs, gathered in front of him, standing, as in old Westminster Hall in England.[12]

No eye-witness record of a praetorian criminal trial at Rome has come down to us. But the emperor in person frequently heard and decided causes, especially important criminal charges; and we possess a lively sketch, by Philostratus, of the trial of the philosopher Apollonius, about A. D. 90, before the emperor Domitian. Apollonius was a strange character, a combination of Socrates, Diogenes, and St. Francis; claiming certain supernatural powers, and traveling all over the Roman world. When the vicious and cruel Domitian was at the height of his tyrannous rule, and was in special fear of a conspiracy against his life by Nerva (his successor), some sycophant laid an information for sedition against Apollonius, as being a friend of Nerva, and the emperor ordered his arrest. The principal charge was that he had killed and eaten a boy, as a sacrifice to

enable him to prophecy success to Nerva. The charge was preposterous; but Domitian's ruthless credulity was known, and Apollonius' friends advised him to remain hidden in Greece. But Apollonius, conscious of rectitude, journeyed straightway to Rome and surrendered himself. After a long sojourn in prison, he was brought to trial before the emperor. During his trial he conducted himself with the same daring nonchalance that is recorded of Socrates; although he had been fully warned that the emperor was determined to put him to death, and was "merely going through the form of a trial to preserve a semblance of justice":[1]

[*Apollonius' Trial.*] "Let us now repair to the law-court to listen to the sage pleading his cause; for it is already sunrise and the doors are thrown open to admit the celebrities. And the companions of the emperor say that he had taken no food that day, because, I imagine, he was so absorbed in examining the documents of the case. For they say he was holding in his hands a roll of writing of some sort, sometimes reading it with anger, and sometimes more calmly. And we must needs figure him as one who was angry with the law for having invented such things as courts of justice.

"But Apollonius, as we meet him in this conjuncture, seemed to regard the trial as a dialectical discussion, rather than as a race to be run for his life; and this we may infer from the way he behaved before he entered the court. For on his way thither he asked the clerk who was conducting him, where they were going; and when the latter answered that he was leading him to the court, he said: 'Whom am I going to plead against?' 'Why,' said the other, 'against your accuser, of course, and the emperor will be judge.' 'And,' said

7. *Trial Methods*

Apollonius, 'who is going to be judge between myself and the emperor? For I shall prove that he is wronging philosophy.' 'And what concern,' said the other, 'has the emperor for philosophy, even if he does happen to do her wrong?' 'Nay, but philosophy,' said Apollonius, 'is much concerned about the emperor, that he should govern as he should.' The clerk commended this sentiment, for indeed he was already favourably disposed to Apollonius, as he proved from the very beginning. 'And how long will your pleading last by the water-clock's reckoning? For I must know this before the trial begins.' 'If,' said Apollonius, 'I am allowed to plead as long as the necessities of the suit require me to, the whole of the Tiber might run through the meter before I should have done; but if I am only to answer all the questions put to me, then it depends on the cross-examiner how long I shall be making my answers.'

"This was how he prepared himself to confront the despot's manoeuvres; and as he waited before the court another clerk came up and said: 'Man of Tyana, you must enter the court without your cloak.' 'Are we then to take a bath,' said Apollonius, 'or to plead?' 'The rule,' said the other, 'is not to regulate the style of dress, but the emperor aims to prohibit your bringing here either amulet, or book, or any papers of any kind.' 'And not even a cane,' said Apollonius, 'for the back of the idiots who gave him such advice as this?' Whereat the accusing witness (who stood by) burst into shouts: 'O my emperor,' he said, 'this wizard threatens to beat me, for it was I who gave you this advice.'

". . . Such were the preliminary skirmishes which preceded the trial. But the conduct of the trial itself was as follows: The court was fitted up as if for an audience listening to a panegyrical discourse; and all the illustrious men of the city were present at the trial, because the emperor was intent upon proving, before as many people as possible, that Apollonius was an accomplice of Nerva and his friends. Apollonius, however, ignored the emperor's presence so completely as not even to glance at him; and when the accuser up-

braided him for want of respect, and bade him turn his eyes upon the god of all mankind, Apollonius raised his eyes to the ceiling, by way of giving a hint that he was looking up to Zeus, and that he regarded the recipient of such profane flattery as worse than he who administered it. Whereupon the accuser began to bellow and spoke somewhat as follows: ''Tis time, my sovereign, to apportion the clock-water, for if you allow him to talk as long as he chooses, he will choke us. Moreover I have a roll here which contains the heads of the charges against him, and to these he must answer, so let him defend himself against them one by one.'

"The emperor approved this plan of procedure and ordered Apollonius to make his defence according to the accuser's demand; however, he ignored some of the charges as not worth discussion, and confined himself to four questions which he thought were embarrassing and difficult to answer. 'What induces you,' he said, 'Apollonius, to dress yourself differently from everybody else, and to wear this peculiar and singular garb [i. e. linen only, not wool]?' 'Because,' said Apollonius, 'the earth which feeds me also clothes me, and I do not like to bother the poor animals.' The emperor next asked the question: 'Why is it that men call you a god?' 'Because,' answered Apollonius, 'every man that is thought to be good, is honoured by the title of god.' (I have shown in my narrative of India how this tenet passed into our hero's philosophy.) The third question related to the plague in Ephesus; 'What motived,' he said, 'or suggested your prediction to the Ephesians that they would suffer from a plague?' 'I used,' he said, 'O my sovereign, a lighter diet than others, and so I was the first to be sensible of the danger; and if you like, I will enumerate the causes of pestilences.' But the emperor, fearful, I imagine, lest Apollonius should reckon among the causes of such epidemics his own wrong-doing, and his incestuous marriage, and his other misdemeanors, replied: 'Oh, no, I don't care to hear about that.'

7. *Trial Methods*

"And when he came to the fourth question, which related to [aiding the conspiracy of] Nerva and his friends, instead of hurrying straight on to it, he allowed a certain interval to elapse; and after long reflection, and with the air of one who felt dizzy, he put his question in a way which surprised them all; for they expected him to throw off all disguise and blurt out the names of the persons in question without any reserve, complaining loudly and bitterly of the sacrifice [of the boy by Apollonius]; but instead of putting the question in this way, he beat about the bush, and said: 'Tell me, you went out of your house on a certain day, and you travelled into the country, and you sacrificed the boy—I would like to know for whom?'"

[At this point Apollonius was ready with a complete defence, in a prepared written speech, which however he did not deliver, choosing rather the daring alternative of demanding proof by the informer. The passage which he was ready to deliver on this part of the charge was as follows:]

"'What then, O sycophant, was I really doing on that night? Here is my answer: Philiscus of Melos, who was my fellow-pupil in philosophy for four years, was ill at the time; and I was sleeping out at his house, because he was suffering so terribly that he died of his disease. Ah, many are the charms I would have prayed to obtain, if they could have saved his life Those are the facts, my prince, which you may learn also from Telesinus the consul; for he too was at the bedside of the man of Melos, and nursed him by night like myself. But if you do not believe Telesinus, because he is of the number of philosophers, I call upon the physicians to bear me witness, and they were the following: Seleucus of Cyzicus and Stratocles of Sidon. Ask them whether I tell the truth. And what is more, they had with them over thirty of their disciples, who are ready, I believe, to witness to the same fact; for if I were to summon hither the relatives of Philiscus, you might probably think that I was trying to interpose

delays in the case; for they have lately sailed from Rome to the Melian country in order to pay their last sad respects to the dead. Come forward, O ye witnesses, for you have been expressly summoned to give your testimony upon this point.' [The witnesses were to give their evidence. Apollonius continues:] 'With how little regard then for the truth this accusation has been drawn up, is clearly proved by the testimony of these gentlemen; for it appears that I spent that night not in the suburbs, but in the city; not outside the wall, but inside a house; not with Nerva, but with Philiscus; not slaying another, but praying for a man's life; not thinking of matters of state, but of philosophy; not choosing a revolutionist to supplant yourself, but trying to save a man like myself. What then is that informer doing in this case? What becomes of the absurd stories of victims slain? How dare he ask you to believe such lies? For what never took place will be real, if you decide that it did take place.'"

[Instead of the foregoing speech, however, Apollonius answered as follows:]

"And Apollonius as if he were rebuking a child replied to the emperor: 'You are cleverly assuming the very fact charged; for *if* I did leave my house, I could indeed have been in the country; and *if* I was there, then I could have offered the sacrifice: and *if* I offered it, then I could have ate of it. But let these assertions be proved by trustworthy witnesses.' Such a reply on the part of the sage aroused louder applause than beseemed the court of an emperor; and the latter, deeming the audience to have borne witness in favour of the accused, and also not a little impressed himself by the answers he had received, for they were both firm and sensible, said: 'I acquit you of the charges; but you must remain here until we have had a private interview.' Thereat Apollonius was much encouraged and said: 'I thank you indeed, my sovereign; for I would fain tell you how by reason of these miscreants like this informer here your cities are in ruin, and the islands full of exiles, and the mainland of

lamentations, and your armies of cowardice, and the senate of suspicion. Accord me then, if you will, opportunity to speak; but if not, then send someone to take my body, for my soul you cannot take. Nay, you cannot take even my body.

"'For thou shalt not slay me, since I tell thee I am not mortal.'

"And with these words he vanished from the court; which was the best thing he could do under the circumstances, for the emperor clearly intended not to question him sincerely about the case, but about all sorts of irrelevant matters. For he took great credit to himself for not having put Apollonius to death."

In every provincial city, from Britain to Palestine, the Roman praetor—subject only to the emperor's rescripts—dispensed justice according to Roman law. A trial-scene in Athens, under the Roman proconsul, about A. D. 330, is preserved for us in a pen-picture by the biographer of Julian, one of the leading sophist-philosophers who then dominated the intellectual world. The sophists, at that period, were held in highest public honor, occupied official professorships, received enormous emoluments (a lecture fee of 250,000 drachmae, or $50,000, is recorded), and possessed large schools or factions of followers, who jealously maintained the honor of their rival leaders. Two of these schools at Athens—one led by Julian, the other by Apsines the Spartan—had come to blows; hence the trial, as described by Julian's biographer:[m]

[*Trial of the Sophists.*] "I must set down and introduce into this narrative the following sample of the man's all-round ability and judgment. It so happened that the boldest of the pupils of Apsines

had, in a fierce encounter, got the upper hand of Julian's pupils in the course of the war of factions that they kept up. After laying violent hands on them in Spartan fashion, though the victims of their ill-treatment had been in danger of their lives, they prosecuted them, as though the Apsinians themselves were the injured parties. The case was appealed to the proconsul, who, showing himself stern and implacable, ordered that the defendants' teacher also be arrested, and that all the defendants be brought in chains, like men imprisoned on a charge of murder. It seems, however, that, for a Roman, he was not uneducated or bred in a boorish and illiberal fashion. Accordingly Julian was in court, as he had been ordered, and Apsines was there also, not in obedience to orders but to help the case of the plaintiffs. Now all was ready for the hearing of the case, and the plaintiffs were permitted to enter. The leader of the disorderly Spartan faction was one Themistocles, an Athenian, who was in fact responsible for all the trouble, for he was a rash and headstrong youth and a disgrace to his famous name. The proconsul at once glared fiercely at Apsines, and said: 'Who told you to come here?' He replied that he had come because he was anxious about his boys. The magistrate concealed his real opinion and said no more; and then the prisoners who had been so unfairly treated came again before the court, and with them their teacher. Their hair was uncut and they were in great physical affliction, so that even to the judge they were a pitiful sight. Then the plaintiffs were told to speak, and Apsines began to make the speech; but the proconsul interrupted him and said: 'This is not the procedure approved by the Romans. He who delivered the speech for the prosecution at the first hearing must try his luck at the second also.' There was then no time for preparation, because of the suddenness of this ruling. Themistocles had made the speech for the prosecution before, but now on being compelled to speak he changed colour, bit his lips in great embarrassment, looked furtively towards his comrades, and consulted them in whispers as to what they had better do. For they had come into court prepared only to shout and

applaud vociferously their teacher's speech in their behalf. Therefore profound silence and confusion reigned,—a general silence in the court and confusion in the ranks of the accusers. Then Julian humbly interposed: 'At least give me leave to speak.' Whereupon the proconsul exclaimed: 'No, not one of you shall plead, you teachers who have come with your speeches prepared, nor shall any one of your pupils applaud the speaker; but you shall learn forthwith how strict and complete is the justice that the Romans dispense. First let Themistocles go on with his speech for the prosecution, and then he whom you think best fitted shall speak in defence.' But no one spoke up for the plaintiffs, and Themistocles' failure was a scandal and a disgrace to his great name.

"And then, when the proconsul ordered that any one who could should reply to the original speech of the prosecution (at the first hearing) Julian the sophist said: 'Proconsul, in your superlative justice you have transformed Apsines into a Pythagoras, in that tardily but very properly he has learned how to preserve silence; for Pythagoras long ago (as you are well aware) taught his pupils silence. But, if you will allow one of my pupils to make our defence, give orders for Prohaeresius to be released from his bonds, and you shall judge for yourself whether I have taught him the Attic manner or the Pythagorean.' The proconsul granted this request very graciously (as Tuscianus, who was present at the trial, reported to the author), and Prohaeresius came forward from the ranks of the defendants without his fetters, before them all, after his master had called out to him (not in a loud and piercing voice, such as is used by those who exhort and incite athletes contending for a garland, but still in penetrating accents): 'Speak, Prohaeresius! Now is the time to make a speech!' He then first delivered a proöemium of some sort (Tuscianus could not exactly recall it, though he told me its purport). It launched out, and soon slid into a pitiable account of their sufferings, and he inserted an encomium of their teacher. In this proöemium he let fall only one allusion to a grievance, when

he pointed out how headlong the proconsular authority had been, since even had there been proof of their guilt it was not decent for them to be subjected to such indignities. At this the proconsul bowed his head, and was overcome with admiration of the force of his arguments, his weighty style, his facility and sonorous eloquence. Meanwhile, they all longed to applaud, but sat cowering as though forbidden to do so by a sign from heaven, and a mystic silence pervaded the place. Then he lengthened his speech into a second proöemium as follows (for this part Tuscianus remembered): 'If, then, men may with impunity commit any injustice and bring accusations and win belief for what they say, before the defence is even heard, so be it! Let our city be enslaved to Themistocles!'

"Then up jumped the proconsul, and shaking his purple-edged cloak (the Romans call it a 'tebennos'), that austere and inexorable judge applauded Prohaeresius like a schoolboy. Even Apsines joined in the applause, not of his own free will, but by sheer force of necessity. Julian his teacher could only weep with joy. The proconsul ordered all the accused, but of the accusers their teacher only, to withdraw, and then taking aside Themistocles and his Spartans, he gave them a practical example of the floggings of Lacedaemon, and added besides the kind of flogging in vogue at Athens."

The most momentous trial in Roman history took place in the Praetorium at Jerusalem.[13] "And they began to accuse Him, saying, We found this man perverting our nation." And Pilate at first sent Him to Herod, the Hebrew king; but Herod sent Him back to Pilate; for though the Hebrew people still lived according to their own laws, the Roman praetor alone could give a judgment of death (*ante*, Chap. III). So Pilate—the example, for



VII. 13—Jesus Arraigned before Pilate



VII. 14—Pilate Asking the Multitude

"And Pilate saith unto them, 'What then shall I do unto Jesus?' "

all time, of the cowardly judge—went out and addressed the multitude and asked them, "What shall I do unto Jesus?"[11] And they shouted, "Crucify Him, Crucify Him". And Pilate gave judgment as the mob wished, and he scourged Jesus and delivered Him to be crucified. And the soldiers led Him away in the court of the Praetorium.

8. It was under Augustus that the Roman legal system decisively stepped forward into its characteristic phase.

Under Augustus, the judges and the referees of facts in civil cases were for the first time obliged to follow the written opinions of official jurisconsults; and this fostered a consistent and logical development of fixed principles. Formerly (Pomponius tells us)[a] there had been no official opinions, "but any persons who were reputed for their learning gave opinions when consulted; nor did they give formal authenticated opinions, but either they themselves wrote something for the jurors or the clients reported what they had said. But the Emperor Augustus, so that the law should be held in greater respect and authority, ordained that certain opinions should carry the force of his own authority. And thereafter this privilege began to be sought after. And when in the Emperor Hadrian's time [a century later] certain jurists asked for the privilege, he replied that it was a privilege to be

granted, not asked for." Historians agree as to the significance of this new practice. Augustus' measure had made it now possible for Roman law to become a science, and thus to have a different fate in the world from Greek law and to form a new type in legal evolution.

The supreme period of Roman juristic science was reached in the 2d and 3d centuries A. D. By this period, the Roman legal instinct had developed far beyond that of any of the earlier races, Oriental or Greek. The administration of justice, on the one hand, had been separated from general political administration; and, on the other hand, justice by law had been differentiated from a primitive popular justice by referendum. The praetor had become the typical judge of our modern ideals, the first of the kind—secular, not priestly; a lawyer, not a layman; an adjudicator, not an administrator. Professional jurists in copious treatises expounded legal principles in systematic form. Schools of law-study arose and multiplied.

Five great names may be chosen from many, typifying these achievements,—Julian, the judge; Ulpian and Papinian, the counsellors; Quintilian, the professor; and Gaius, the jurist.

9. JULIAN, the judge,[15] made Roman practice cosmopolitan, doing for it what Lord Mansfield did for



VII. 15—JULIAN THE JUDGE

To him is attributed the authorship of the Perpetual Edict,—
the first Code of Practice, as it would be called today

English commercial law. He had already written a treatise numbering ninety books. But about A. D. 130, as praetor, he consolidated the various practice rules that had been annually announced by the preceding praetors of various jurisdictions, and compiled a single code of practice, thenceforth to be perennial, and known as the Perpetual Edict. A few passages will illustrate the style of this unique code,—the first published code of practice in any system:°

[*The Praetorian Perpetual Edict.*] "[11a] Parties sued at law must either appear in person or appoint a surety.

"[b] No one shall, without my consent first given, maintain a suit against his parent, his patron, or patroness, or the children or parents of a patron or patroness.

"[c] If such suit be instituted against a parent, or patron or patroness, or the children or parents of a patron, or his own children or any one in his wardship, or his wife, or his daughter-in-law, any person whosoever may be received as surety.

"[d] If a party has appointed a surety and then neither can be found nor is defended by his surety, I will order an attachment of his goods.

"[12] No one shall by force release a party sued at law nor by malicious contrivance aid his release. . . .

"[40] Bad faith. On a transaction found to have been done in bad faith, if no other remedy applies and adequate grounds appear, and less than a year has elapsed since first the party could have known of the bad faith, I will give judgment.

"[41] Minors under 20. A transaction with a person under 20 years of age, whatever the subject of it may be, I will declare censurable.

[42] Civil incapacity. If any person, man or woman, is found to have become civilly incapacitated after any transaction done or had with him or her, I will give judgment against him or her, equally as if that fact had not supervened. . . .

"[61] Throwing or pouring into the highway. If on any place where a way is used by the public or where people are standing, any substance is thrown or poured, for the damage thus caused or done I will give judgment, in double amount, against the party there dwelling. If by such force a free citizen is found to have come to his death, I will give judgment for 50 M sesterces. If he lives and is found to have been injured, I will give judgment, against the party liable, for whatever sum shall appear to be just. If a slave is found to have done it without his master's knowledge, I will add to the order: 'with privilege of surrendering the slave in lieu of money.'

"[62] No one shall maintain in or on the eaves of his house, over a place where the public uses a way or is standing, any article the fall of which could cause damage. If any one violates this, I will give judgment against him for 10 M sesterces. If a slave is found to have done it without his master's knowledge, I will order that he be defended by a surety or be surrendered in lieu of compensation. . . .

"[64] Gamesters. If any one assaults a person in whose house a dicing game is carried on, or otherwise does damage to him, or if at such time any article is taken from his house, I will not give judgment.

"If any person by reason of a dicing game has used force, I will proceed against him as may be necessary. . . .

"[104b] After the death of a person who is in wardship to another, or after he has been emancipated or manumitted or transferred, if as to his separate estate anything has been done in bad faith, by the party in whose wardship he was, to the diminution of the estate, then within one year after knowledge of the fact could have been obtained, I will give judgment. . . .

"[188] Riot. If in the course of a riot any person is found maliciously to have caused damage or loss, I will give judgment against him, for double the amount of the damage if sued for within one year after knowledge could have been obtained, and for simple damages if after the year.

"[189] Fire, Collapse, Shipwreck, Forcible Capture of Raft or Vessel. If any one is found, in the course of a fire or building-collapse or shipwreck or forcible capture of a raft or vessel, to have converted or received in bad faith any article, or to have done any damage in the premises, I will give judgment quadruple the amount, if suit is brought within one year after knowledge could have been obtained, and for simple damages if after the year. Likewise I will give judgment against a slave or member of the household."

The forms of judgment used by the praetor at Rome have not come down to us. But the Egyptian papyri, preserving the doings of Roman administrators, in the Greek language used in that region, have furnished a few examples, which may be taken as fairly representative of the general style on Roman soil in the classic imperial period. The following entry, in Greek with a Latin copy, from the year A. D. 124, deals with a lawsuit over a will, and shows the parts played by judge, counsellor (juris-consult), advocate, and clerk of court:[p]

[*Court Record of A. D. 124.*] "Extract from the record of proceedings of Blaesius Marianus, prefect of the first cohort of Cilician cavalry, by appointment of Haterius Nepos, chief prefect, in the 8th year of the Emperor Caesar Trojan Hadrian Augustus and Pharmiti XVIII [15 July A. D. 124], the counsellor Claudius Artemidorus being in attendance.

9. *The Judges*

"Aphrodisius son of Apollonius against Ammonius son of Apio. Aphrodisius by his advocate Soterichus alleges that he had entered into marriage, without writing, with a certain woman Saraputa, and had by her had a son Origen, now deceased, and others; that the law vests in the father the inheritance of sons born of a marriage not contracted in writing; that the defendant now claims as heir to [the son] Origen under a will [of the said Origen]; that the latter had not, according to law, the power to make a will in favor of any third person during his father's lifetime; that the will made in favor of the defendant was therefore invalid and unjust; and that the plaintiff claims title to the property left by his son.

"Ammonius by his advocate Marcianus replies that the laws of Egypt accord power to all persons whomsoever to make a will leaving their property to whomsoever they may choose; that he the defendant, being the son of a deceased brother [of the plaintiff] had been made heir [by the will], together with another son [of the deceased brother]; and that the will had the required number of witnesses.

"Blaesius Marianus [said], 'Read the will of Origen', which being read was dated in the 8th year of Emperor Hadrian.

"Then Blaesius Marianus, prefect of the first cohort of Cilician cavalry, after consultation with the counsellor Artemidorus dictated the order here reading as follows to wit: Origen, the deceased, born to his father from a marriage contracted without writing, appears to have nominated an heir, but he had not the power to make a will during the lifetime of his father.

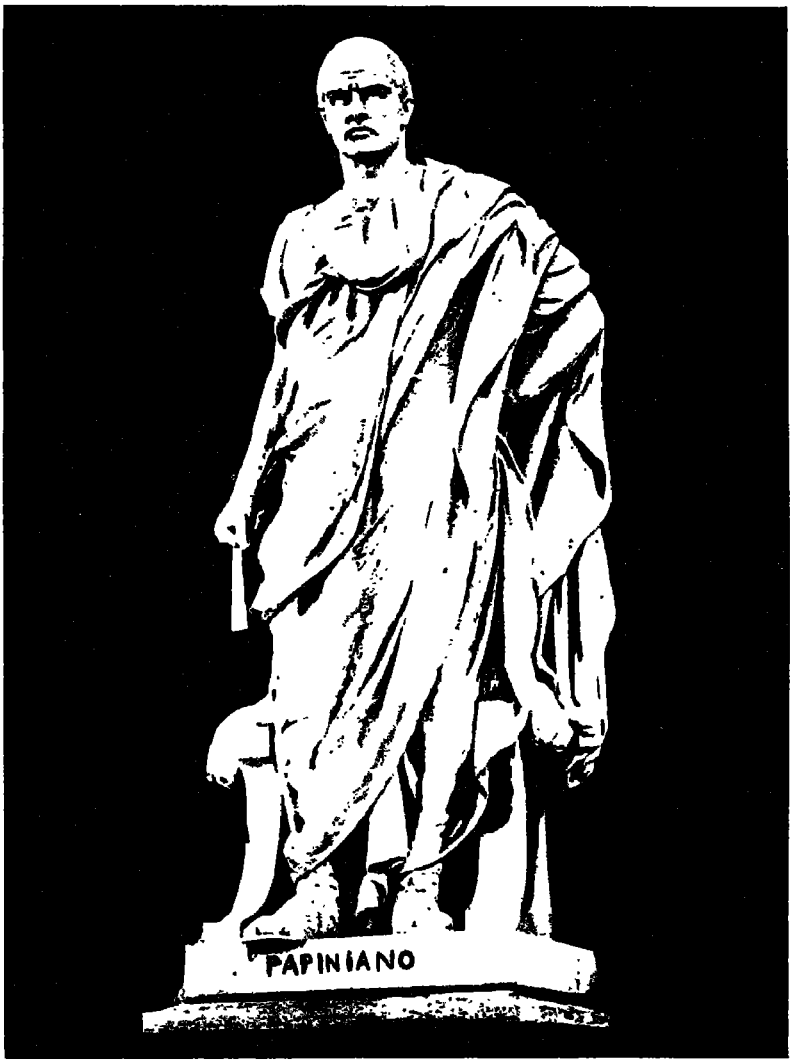
"And Ammonius [the defendant] then averring that Origen was the issue of a marriage contracted in writing and Aphrodisius [the plaintiff] on the other hand repeating his averment that Origen was not the issue of a marriage contracted in writing, Blaesius Marianus, prefect of the first cohort of Cilician cavalry [ordered] that Aphrodisius make proof of this fact within 60 days.

"Aphrodisius then requesting that, during the status quo, an inventory be made of the property left by the deceased, Blaesius Marianus ordered Isidorus of the prefectorial staff to make an inventory in duplicate, and to deliver copies to the parties concerned, the key of the house to remain under seal in the custody of Ammonius. And a little later Isidorus reporting that this order had been complied with, Blaesius Marianus directed that the order of postponement be entered in the record."

Another but briefer record, apparently of an interlocutory proceeding, illustrates that in general features the style and contents of these court records were of a type strikingly similar to those of the English (unofficial) Year-Books and different from the English (official) court records: the parties here were Romans in Egypt:[15]

[*Court Record of A. D. 207.*] "Before Subatianus Aquila, 15th year of the reign of Phamenos XVII. On summons, Sabinus and Maximus Dionysius appeared. And after proceedings had, Aquila said [to the advocate Asclepiades], 'What have you to say as to the time of possession, which they assert was about 14 years after the purchase of the Pausorapis estate, and as to their silence during that period?' Asclepiades the advocate said: 'That was the fact.' Aquila said: 'The imperial [Roman] decrees apply to inhabitants of the provinces. If the right of possession has fallen to one person, and another person has started in occupation [of the premises] but not long enough to satisfy the legal [20-year] period, and the other party who claims title has been silent and made no opposition for more than 10 years, the title is to be validated of those who are in possession.'"

10. PAPINIAN[16] and ULPIAN, the counsellors, typify the practice of justice placed, where it always should be,



VII. 16—Papinian the Counsellor

in the hands of a legal profession, highly trained and wise. For us, these two bear also this sentimental distinction, that (with Paulus) they once dispensed justice in the island of Britain, as Roman magistrates in a Roman basilica.

PAPINIAN[16] was termed, in Justinian's Digest, "the illustrious"; for he had received the extraordinary distinction that among the five principal jurisconsults, where they were divided in opinion, his opinion if recorded should prevail. But his truest fame should be that he died a martyr to his professional honesty; for when the ruthless Emperor Caracalla caused the assassination of his own brother, who shared the throne with him, and then directed Papinian, his attorney-general, to prepare a legal opinion justifying the deed, Papinian courageously refused, with the memorable words, "I do not find it so easy to justify such a deed as you did to commit it". And for this rebuke Papinian was himself put to death.

Of the style of "consultatio", or opinion, which these counsellors prepared, no textual examples from the classic period have survived. But from this later specimen (dating in the early A. D. 500's, and doubtless of inferior grade) we can re-construct the general type:

[*Opinion of a Jurisconsult.*] "You have consulted me on the question whether an agreement for partition of an inheritance be-

tween brother and sister is valid when the woman (as you say) signed by command and under duress of her husband and without knowledge of the nature and effect of the terms contained or inserted in the said agreement.

"(2) My opinion is that the agreement as stated in your request for an opinion is void in law, and that it cannot stand, since it is entirely violative of the safeguards provided by the law.

"(3) And first, on the facts as you state them, according to the said laws concerning agreements accompanied by force, an agreement endangering liberty and exacted by fear is most plainly void; for it is definitely laid down that no one shall be compelled to promise against his will.

"(4) Furthermore, a passage of these well-known laws runs thus: 'Which he did of his own free will and desire'. Who is so destitute of wisdom and lacking in intelligence as to assert that a contract should be valid and binding which a woman has signed under coercion in fear of her husband, and thus cannot be supposed to have had free will and independent discretion?

"(5) Furthermore, by the same principle of law above referred to, such an agreement is deemed to be of no effect, as the laws below quoted show.

"(6) Gregorianus Bk. II: 'Emperor Severus A. Julius Conserturinus. It has long since been decided that transactions executed through force and fear, should be void, even without the aid of the Prince: Approved July 1 in the consulship of Dexterus II and Priscus.'

"(7) Also another passage in the above cited volume: 'Emperor Antoninus A. Julius Basilae. It is undoubtedly the law that agreements made against a person's will or contrary to the laws and ordinances are void. PP. 28 July in the consulship of Antoninus IV and Albinus.'

"(8) 'Emperor Alexander A. Dionysius: 'The passage providing that an agreement made in bad faith is void, etc. PP. 12 Aug. in the consulship of Alexander Augustus.'

"(9) Also other provisions in the same book and title: 'Emperors Diocletianus and Maximianus A. A. Aurelius Heraclidus: If you without authority from your wife released a surety for her opponent, and it can be shown by plain documentary proof that this was done without her knowledge and against her will, the release will be of no effect. PP. 6 Sept. in the consulship of Diocletianus IIII and Maximianus III.'

"(10) Likewise other provisions in the same book and title: 'Emperors Carus Carinus and Numerianus AA. Aurelius: Since, as you assert, the settlement was made for a fraudulent purpose, the authority of law makes void what was done between you: PP. 8 December in the consulship of Carinus and Carus.'

"(11) Therefore, if the laws are to be preserved and the statutes of the emperors are to be respected, the agreement of which we have been speaking has manifestly no force.

"(12) At this point, I have thought it worth while to quote the Theodosian law concerning agreements, because at the beginning of the said ordinance it runs thus: 'If he has sought to repudiate agreements or settlements which he has executed of his free will and discretion, let him pay the penalty, lose the profits, and incur infamy'; but this applies to a person who had free discretion and not to one who acted unwillingly and had not the will to act."

ULPIAN[17] was the author of that lofty definition, "Justice is the constant and perpetual will to allot to every man his due". He wrote twenty-three treatises; and to his epigrammatic invention we owe many of our familiar law-Latin maxims, such as "Volenti non fit injuria".



VII. 17—ULPIAN THE COUNSELLOR

It was Ulpian who defined Justice as "the constant and perpetual will to allot to every man his due"

VII. Roman Legal System

The logical development of the law that now ensued, through the writings of these jurisconsults, may be illustrated by some passages from one of Ulpian's treatises.[5] In the concrete discussions of case-law and in the citations of precedents and opinions, their method, regarded as an original invention, is comparable with that of the Hebrew rabbis, the Hindu pundits, the Mohammedan muftis, and the Japanese judges:

[*Ulpian in Book XXIX of his Commentary on Sabinus:*] "According to Celsus, if property is sold and then is stolen before it is delivered to the purchaser, the latter has no right of action for conversion; the right still remains with the vendor. No doubt (he continues) he can be called upon to assign to the purchaser the action for conversion, and the other remedies as well; or if he should have already recovered anything himself by any of these actions, he must make it over to the purchaser: all this is sound law; and Julianus says the same. It is certain that the goods are at the risk of the purchaser, always provided the vendor exercises due care up to delivery.

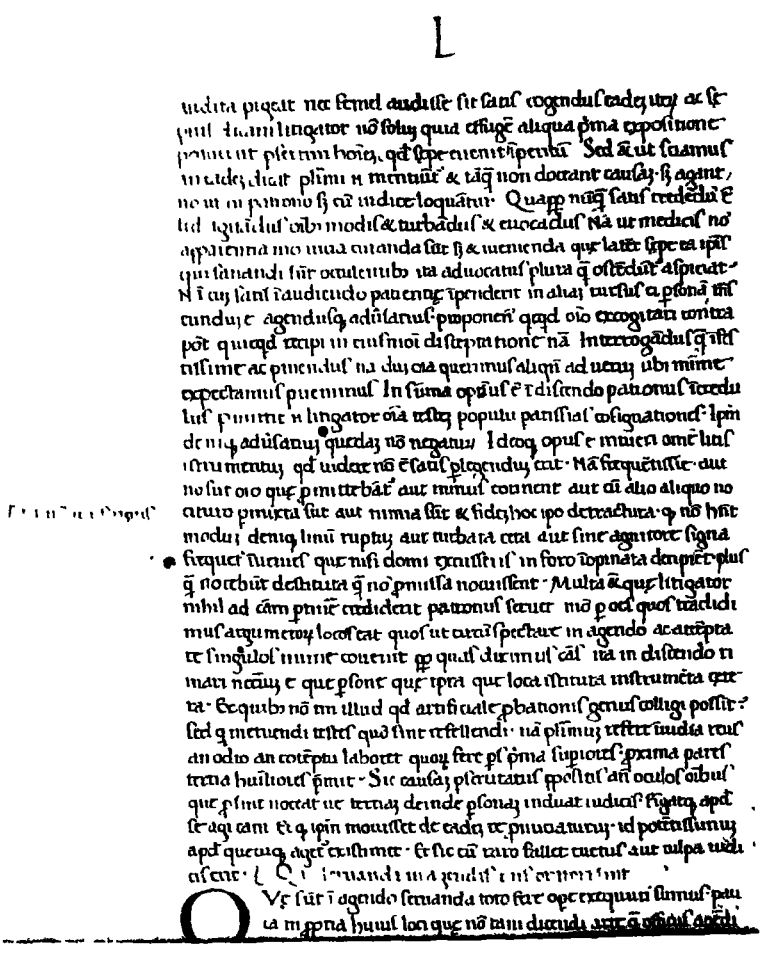
"(1) So true is it that previous to delivery the purchaser has no right of action for conversion, that the question has been asked whether the purchaser is liable to the action if he converts the thing himself. What Julianus says is this (Dig. lib. xxiii): 'if, while it is the duty of the vendor to see to the thing being safe, the purchaser carries it off, having first paid the price, the latter is not liable; but if he takes it without paying, then no doubt he is liable; it is just as if he had taken away his creditor's security.' (2) It may be added that a tenant has the action, though he is not owner, as he has the requisite interest. (3) With regard to the case of a depositee, it is a fair question whether he has the action or not. But he is only re-

sponsible for fraud, consequently the law is, and very reasonably, that he has no right of action for conversion. In fact, if he committed no fraud, where is his interest? If he did commit fraud, then, no doubt the risk is his, still he cannot acquire a right of action by his own fraud. (4) This is in keeping with what Julianus says (Dig. lib. xxii):—'as it is established law in respect to converters in general that they cannot bring an action for conversion in respect of a thing they converted themselves, it follows that a depositee will not be able to bring the action, however true it is that when a man wrongfully handles a thing it puts it at his risk.' (5) Papinian discusses the following case: 'I held two slaves as security for 10 aurei, and one was converted, but the other by himself (the one that remained) was worth as much as the sum secured. If I sue for conversion, am I obliged to make my unit of damages 5 and no more, on the ground that the slave remaining is good for the other 5; or is it the proper view, seeing that that slave may chance to die, that I ought to make the unit 10, even though the slave I have still got is of ample value?' This last is Papinian's own opinion; we ought not, he says, to consider the security the converter left untouched, but the one he took. (6) He adds the following:—'If a slave is converted from me whom I held as security for a debt of 10, and I recover 10 from the converter by an action for conversion, then, if the slave should be converted again, I have no right of action, having no longer any interest, as I have already recovered once. That is, always provided that the conversion was through no negligence of mine; if the negligence was mine, then I can sue, as I have the requisite interest, because I am liable on the action for redemption. Assuming that there is no negligence on my part, then the action, which, as we have seen, is not open to me, can certainly be brought by the owner'. This opinion is supported by Pomponius (ad Sabinum lib. x). (7) These writers also hold that if the two slaves above mentioned should both be converted on the same occasion, the pledgee has the action in respect of each, that is to say, not in respect of each for the whole debt, but for such portion of the debt

as represents his interest in that particular slave, the portion being ascertained by dividing the debt proportionally to the values of the slaves; but if the two slaves are converted at different times, then if the creditor recovers the whole debt in respect of one, he will get nothing by an action brought in respect of the other.

"In the action for conversion the thing taken need only be so far described as to be identified. (1) The weight of receptacles need not be given, it is enough to say, 'a dish,' 'a discus,' 'a cup'; but the material should be given, such as gold, silver, etc. (2) If the subject of the action is unwrought silver, it should be described as a mass of silver, and the weight should be given. (3) In the case of silver coins, the plaintiff must give the number, and similarly he would have to say that so many gold coins or more have been taken from him. (4) As to an article of dress, the question has been raised whether the colour should be specified. No doubt this ought to be done; in the case of a gold cup you specify the material, and in the same way you ought to give the colour of clothes. It is true that if a man declares on oath that he cannot say for certain what the colour is, he must be excused this particular requirement."

11. QUINTILIAN, the teacher, has left for us the best record of the combined art of the advocate and the practitioner. He was the first official professor of law ever appointed. For twenty years (about A. D. 68-88) he lectured on the art of advocacy, and students flocked to Rome from all Italy and the distant provinces to receive his instructions. His work on "The Education of the Advocate" teems with observations and precepts which fit the conditions of the Anglo-American bar today as well as the Roman bar of eighteen centuries ago.[18] His twelfth book should be mastered by every young lawyer; and the



VII. 18—Quintilian's "Education of the Advocate"
The passage quoted in translation begins at the ninth line

insight and aptness of his comments reveal how little the human nature of law-practice has changed in two thousand years. Here is an illustrative passage upon preparation for trial:[t]

[*Quintilian, on Preparation for Trial.*] [Book XII, c. VII, par. 10.]

"10. When the advocate [consulted by the client] has exercised sufficient patience in listening to the client, he must then assume another character, and act the part of the adversary; he must state whatever can possibly be imagined on the other side, and whatever the nature of the case will allow in such a discussion of it. The client must be questioned sharply and pressed hard; for, by searching into every particular, we sometimes discover truth where we least expected to find it.

"11. In a word, the best advocate for learning the merits of a cause is he that is least credulous; for a client is ready to promise everything,—offering a cloud of witnesses, and sealed documents quite ready, and averring that the adversary himself will not even dispute certain points.

"12. It is therefore necessary to examine all the writings relating to a case; it is not sufficient to inspect them; they must be read through; for very frequently they are either not at all such as they were asserted to be, or they contain less than was stated, or they are mixed with matters that may injure the client's cause, or they say too much, and lose all credit from appearing to be exaggerated.

"13. We may often, too, find a thread broken, or wax disturbed, or signatures without attestation; all which points, unless we settle them at home, will embarrass us unexpectedly in the Forum: and evidence which we are obliged to retract will damage a cause more than it would have suffered from none having been offered.

"14. An advocate will also bring out many points which his client regarded as having no bearing on the case, if he but go over all the grounds which I have previously specified for arguments; and as it will be by no means convenient to review all these, and try them one by one, while we are pleading, for the reasons which I have given, so, in studying a cause, it will be necessary to examine minutely what sort of characters are concerned in it, what times, or places, or practices, or documents, have any reference to it, and all other particulars, from which not only artificial proofs may be drawn, but it may be ascertained what witnesses are to be feared, and how they are to be refuted; for it makes a great difference whether an accused person suffers under envy, or dislike, or contempt, of which the first is generally directed against superiors, the second against equals, and the third upon inferiors.

"15. After having thus thoroughly examined a cause, and brought before his eyes everything that may promote or hinder its success, let him, in the third place, put himself in the place of the judge, and imagine the cause to be pleaded before him; and whatever arguments would move him most if he had really to give judgment on the matter, let him suppose that those arguments will have most effect upon any judge before whom it may be brought. Thus the result will seldom disappoint him; or, if it does, it will be the fault of the judge."

12. GAIUS, the jurist, typifies the advent of law as a science.[19] One of Gaius' treatises, the Institutes, served as the text-book of legal study for three centuries after his death (which occurred perhaps about A. D. 200), and is the only Roman law-book, prior to Justinian, that has survived to us in fairly complete text. Totally lost for fourteen centuries, it was found again, by luck, a hundred years ago. The original text looks hopelessly



VII. 19—GAIUS THE JURIST

Gaius' surviving treatise marks him as a genius in legal science. But less is known of his personality than of Shakespeare's

indecipherable;[20] for the manuscript is a palimpsest, that is, written originally on a parchment over which a mediæval monk had later written the life of a saint, after carefully erasing Gaius' text. But modern scholarship and chemistry triumphed and restored to knowledge this priceless book.[21]



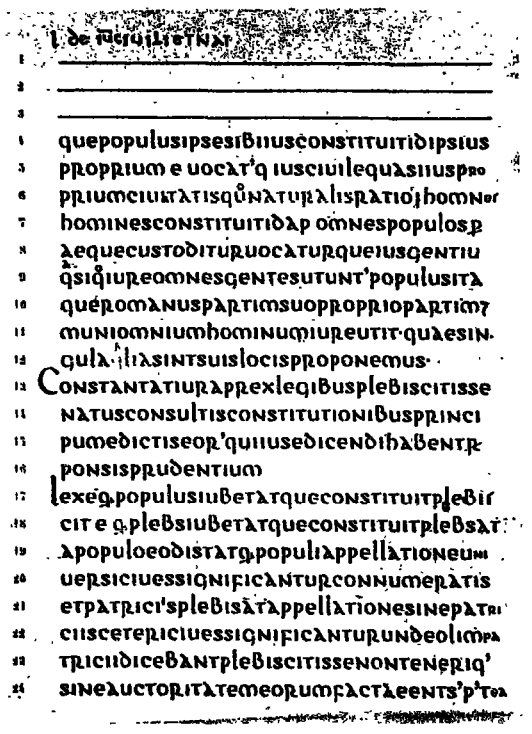
VII. 20—GAIUS' INSTITUTES

This is the appearance of the parchment when Niebuhr first saw it and detected beneath the monk's writing the original obscure law-text

Gaius' book introduces us to the new element in legal thinking,—generalization of concrete rules, by classification and abstraction, into principles forming a system. Its distinctive nature can best be seen in the following extracts:[22]

VII. Roman Legal System

[*Gaius' Institutes, Book First.*] §1. "The laws of every people governed by statutes and customs are partly peculiar to itself, partly common to all mankind. The rules enacted by a given state for its own members are peculiar to itself, and are called civil law; the rules prescribed by natural reason for all are observed by all nations alike, and are called law of nations. So the laws of the people of Rome are partly peculiar to itself, partly common to all nations; and this distinction shall be traced, as occasion offers, through all the branches of the code.



VII. 21—GAIUS' INSTITUTES, RESTORED
This is a page restored in its original characters

"§2. Roman law consists of statutes, plebiscites, senatusconsults, constitutions of the emperors, edicts of magistrates authorized to issue them, and opinions of jurists.

"§3. A statute is a command and ordinance of the people: a plebiscite is a command and ordinance of the commonalty. The commonalty and the people are thus distinguished: the

people are all the citizens, including the patricians; the commonalty are all the citizens, except the patricians.

"§8. Every right which we exercise relates either to persons, or to things, or to actions; and let us first examine the law of persons.

"§9. The first division of men by the law of persons is into freemen and slaves.

"§10. Freemen are divided into freeborn and freedmen.

"§11. The freeborn are free by birth; freedmen, by manumission from legal slavery.

"§12. Freedmen, again, are divided into three classes, citizens of Rome, Latins, and persons on the footing of enemies surrendered at discretion. Let us examine each class in order, and commence with freedmen assimilated to enemies surrendered at discretion

"§48. Another division in the law of persons classifies men as either dependent or independent.

"§49. Those who are dependent or subject to a superior, are either in his power, in his hand, or in his mancipation.

"§50. Let us first explain what persons are dependent on a superior, and then we shall know what persons are independent.

"§142. Let us now proceed to another classification: persons not subject to power, nor to hand, nor held in mancipation, may still be subject either to guardianship or to administration, or may be exempt from both forms of control. We will first examine what persons are subject to guardianship and administration, and thus we shall know who are exempt from both kinds of control.

"§143. And first of persons subject to guardianship or tutelage.

.

"§188. The foregoing statement shows the various kinds of guardian: the question of the number of species to which these kinds

may be reduced involves a long discussion, for it is a point on which the ancient jurists differed greatly; and as I have examined it at length, both in my interpretation of the Edict and in my commentary on Quintus Mucius, for the present occasion it may suffice to observe that some, as Quintus Mucius, make five species; others, as Servius Sulpicius, three; others, as Labeo, two; others make as many species as there are kinds of guardian.

[Book Second.] "§1. In the preceding book the law of persons was expounded; now let us proceed to the law of things, which are either subject to private dominion or not subject to private dominion.

"§2. The first division of things is into two classes: things subject to divine dominion, and things subject to human dominion.

"§3. Subject to divine dominion are things sacred and things religious.

"§4. Sacred things are those consecrated to the gods above; religious, those devoted to the gods below

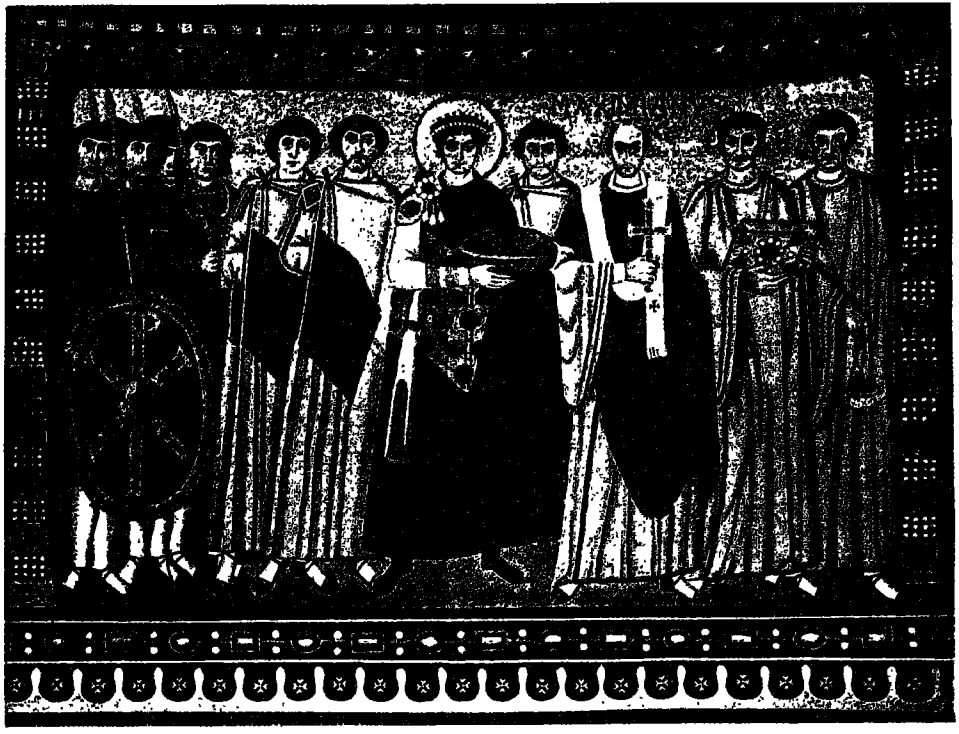
"§10. Things subject to human dominion are either public or private.

"§11. Things public belong to no individual, but to a society or corporation; things private are subject to individual dominion.

"§12. Again, things are either corporeal or incorporeal.

"§13. Things corporeal are tangible, as land, a slave, clothing, gold, silver, and innumerable others.

"§14. Things incorporeal are intangible; rights, for instance, such as inheritance, usufruct, obligation, however contracted. For though an inheritance relates to things corporeal, and the fruits of land enjoyed by a usufructuary are corporeal, and obligations generally relate to the conveyance of something corporeal (land, slaves, money), yet the right of succession, the right of usufructuary



VII. 22—Justinian and His Ministers

This is the mural mosaic in the church at Ravenna, the seat of the Western Roman Empire

enjoyment, and the right of the contractor, are incorporeal. So are the rights attached to property in houses and land, denominated servitudes or easements."

Gaius' classical definition, above quoted, "Every right that we exercise pertains either to persons or to things or to actions", has since served as a basis of juristic discussion during two thousand years. Whether sound or not, it is of momentous significance, for it marks the dawn of legal science in the world. In all the literature of the legal systems prior to the Roman there are no abstract generalizations of the body of positive law,—no jurists treating the rules as a logically connected system. It was this contribution which we owe distinctively to the imperial period of Roman law; and it is this feature which made it possible, a thousand years later, for the mere resurrected texts of the obsolete Roman law to stimulate new thought in the sturdy crude Germanic regions of law, and to lead ultimately to modern juristic science.

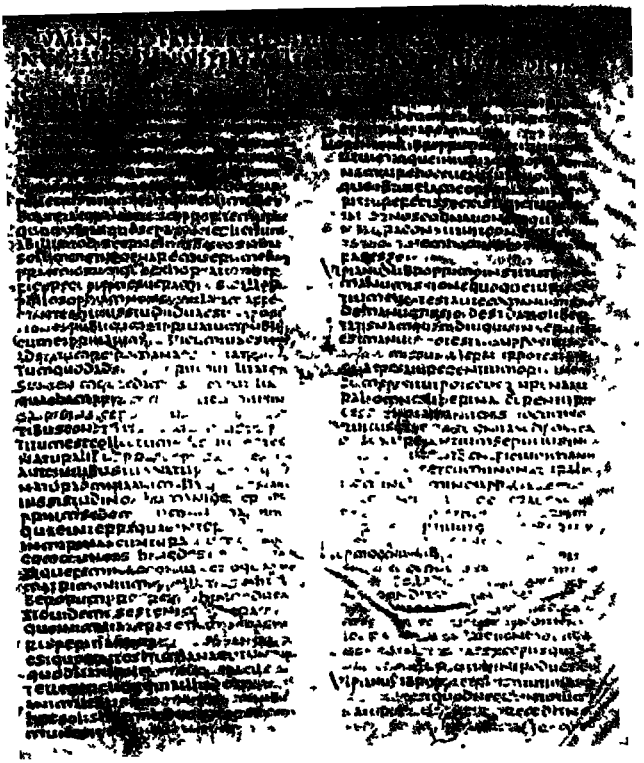
(III) Period of the Later Empire

13. In Gaius' time the Roman Empire included a population of perhaps one hundred and fifty million persons. But during the next three centuries, it became topheavy; and by Justinian's time, A. D. 520, it had been divided into the Eastern and Western Empires.[22] The fierce Goths had twice besieged Rome. Ravenna, in

Northern Italy, had become the Western center; and in that city may still be seen the celebrated mosaic of Justinian and his ministers.[22] Byzantium, or Constantinople, where Greek civilization prevailed, became the Eastern and finally the only center. Native Roman legal thought had long been atrophied, and Byzantine jurists now practiced Roman law in Greek. But the classical treatises of the Roman jurists were still venerated as controlling authorities.

Finally, about A. D. 550, Justinian, at Byzantium, undertook to reduce the now enormous bulk of law to manageable form. The result was the famous Pandects, or Digest, the Code, and the Institutes. The first represented a culling from the most approved juristic writings; the second, a compilation of the Imperial legislation; and the third, a students' handbook of the law. For the Digest,[23] in three short years they collected and examined two thousand books, containing three million sentences or paragraphs; and reduced them to about one hundred and fifty thousand sentences. All the original Latin treatises, from which the choice passages had been culled, were forbidden ever again to be cited, under heavy penalty; and in fact they have all perished, Gaius' Institutes alone surviving by accident.

The world-fame of Justinian rests on this Digest, and it was indeed compiled under his supervision; Benjamin



VII 23—JUSTINIAN'S DIGEST, OR PANDECTS

This is page 1 of the famous manuscript which the Florentines bore off in triumph from Pisa five centuries ago, it was bound in purple, and, when exhibited, all heads must be bared. Today, an official never leaves the visitor's side

Constant's great painting has depicted the scene.[24] But Justinian's preface gives full credit to the commission of seventeen jurists, chaired by Tribonian, the most learned man of the age, to whom the purple-robed emperor committed the huge task. All of these jurists were Byzantine Greeks. Even the Preface to the Digest was promulgated in Greek; and these Roman principles, in Greek paraphrases, survived for some time in the Oriental regions.

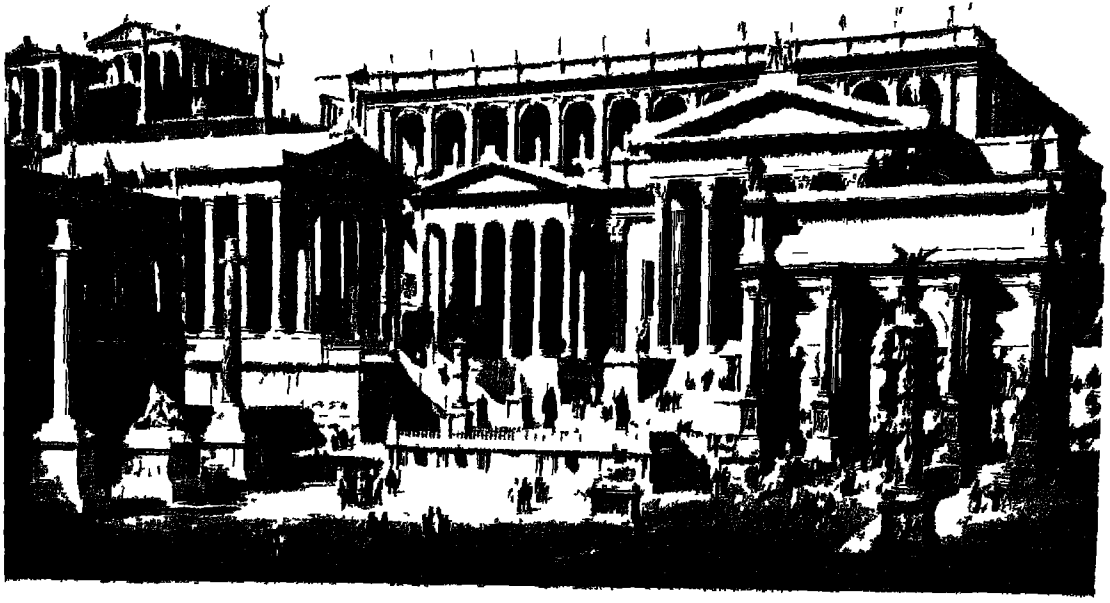
14. But Italy, by this time, was overrun and being settled by the Germanic invaders, whose legal system then dominated. This Latin Digest itself disappeared from general knowledge for five centuries, so that only one complete and reliable copy was ever found again. The time appointed by Fate had arrived for the downfall of the Roman system.

Rome's magnificent edifices[25]—the Capitol with its priceless library of legal records, the superb Forum, the splendid court-houses—were destroyed by fire and siege. All relics of paganism were despised by the fanatics of the new religion. The pillared porticoes that once had echoed the voices of Julian and Papinian were plundered to patch the walls of some medieval shrine or castle; and thousands of sculptured marbles were burned in lime-kilns to make common mortar. The devastated Forum became a cattle pasture. Its very name was forgotten; and from the



VII. 24—JUSTINIAN PRESIDING OVER THE COMPILATION

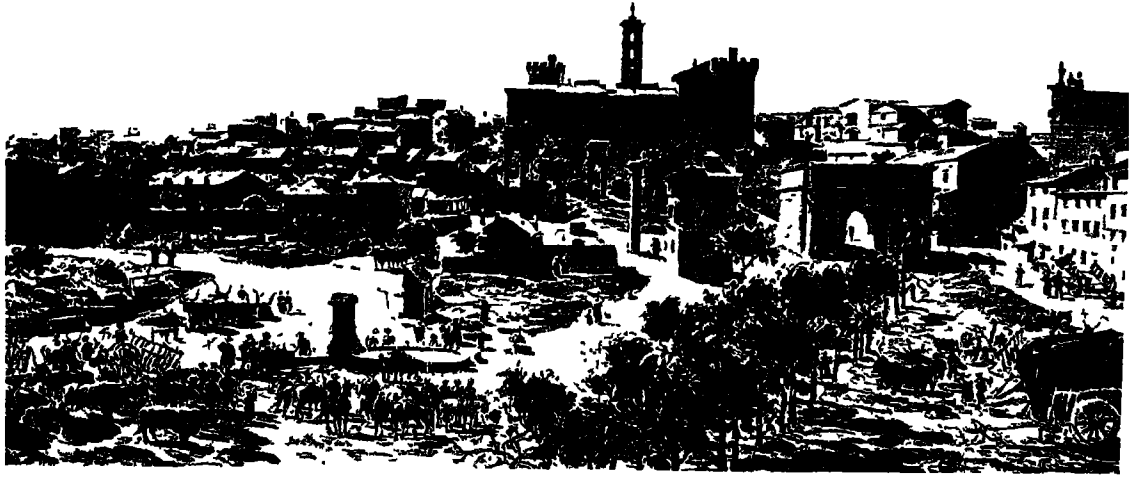
These jurists were Byzantine Greeks, compiling the classic passages from the Latin treatises of three centuries before



VII. 50. THE FORUM

middle ages to modern times it was known only as "the Cattle Field".[26]

Once, five centuries before, at Rome's zenith, as when the apostle Paul was accused of crime, in a far eastern city, before the Roman governor Festus, he could boldly claim the rights of his Roman citizenship. "I ought to be judged before Caesar, and I appeal unto Caesar", said Paul. And Festus answered, "Thou hast appealed unto Caesar, and to Caesar thou shalt go". But now, never again could a Roman citizen throughout a broad empire appeal to Caesar's justice. Jurisprudence had been the one science of the Romans; and with the Roman government it perished in Europe. The justice of the Caesars was no more.



VII. 26—The Deserted Forum in the Middle Ages
For more than a thousand years it was known only as The Cattle Field

VII. Roman Legal System

Sources of Illustrations

1. *Map of the Roman Empire.* From *Keith Johnston*, "The World Classical Atlas", plate 12 (W. & A. K. Johnston, Edinburgh, no date).
2. *Forum.* From a photograph by *R. Solano*, Rome, of an unidentified drawing.

2-*a*. *Forum.* From the drawing in *F. Hoffbauer* and *H. Thédenet*, "Le Forum Romanum", p. 88, plate 4 (Paris, Plon, 1905).

3. *Senate Resolution De Bacchanalibus.* From the facsimile in "Corpus Inscriptionum Latinarum", vol. I, Atlas, "Tabulae lithographae", ed. *Ritschel*, plate XVIII (Berlin, 1862).
4. *Lex Julia Municipalis.* From a photograph of the original, furnished by the Director of the National Museum at Naples, 1923.
5. *Lex Coloniae Genetivae Juliae.* From the facsimile in *M. R. de Berlanga*, "Los Bronces de Osuna", Appendix (Malaga, 1873).
6. *Genoa Judgment.* From a facsimile published by the Municipal Museum of History and Arts, at Genoa.

7, 7. 1 *Contract to Build a Gateway.* From a photograph of the original, furnished by the Director of the National Museum at Naples; there is also a facsimile in *Otto Gradenwitz*, "Additamentum", vol. 2, "Simulacra", to *C. G. Bruns*, "Fontes Juris Romani", 7th ed. (Tübingen, 1912); the design is given in "Corpus Inscriptionum Latinarum", cited *supra*.

8. *Hortensius.* From a photograph made for the author by *Alinari Bros.*, Rome, of the statue in the Palace of Justice, Rome.
9. *Cicero.* From a photograph by *Alinari Bros.*, Rome, of the bust in the Capitoline Museum.
10. *Cicero's Speech against Catiline.* From a photograph by *Alinari Bros.*, Rome, of the painting by *Maccari* in the Senate House (Palazzo Madama).
11. *Ulpian Court-House.* From a photograph by *R. Solano*, Rome.
12. *Constantine Court-House.* From a photograph by *Carlini & Mori*, Rome.
13. *Jesus Arraigned before Pilate.* From a reproduction of the painting by *Michael Munkacsy*, owned by Rodman Wanamaker, Philadelphia (copyright). No eye-witness account of a praetorian criminal trial at Rome is extant. But the scene has been reconstructed in fiction with master hand by a modern scholar: *E. Lucas White*, "Andivius Hedulio; Adventures of a Roman Nobleman in the Days of the Empire", c. 37, p. 549 (New York, Dutton, 1921).

14. *Pilate Asking the Multitude.* From a photograph by *Alinari Bros.*, Rome, of the painting by *Antonio Ciseri*, in the Modern Art Gallery at Florence.

15. *Julian the Judge.* From a photograph made for the author by *Alinari Bros.*, Rome, of the statue in the Palace of Justice.

16. *Papinian.* From a photograph made for the author by *Alinari Bros.*, Rome, of the statue in the Palace of Justice.

17. *Ulpian the Counsellor.* From a photograph made for the author by *Alinari Bros.*, Rome, of the statue in the Palace of Justice.

18. *Passage from Quintilian.* From a photograph, furnished by *Albert S. Osborn*, of New York, of the manuscript in the Laurentian Library at Florence.

19. *Gaius.* From a photograph made for the author by *Alinari Bros.*, Rome, of the statue in the Palace of Justice.

20. *Gaius' Institutes, Original MS.* From the facsimile of the original (in the Verona Library) in "Gai Codex Rescriptus phototypice expressus" (Leipzig, Karl W. Hiersemann, 1909, from plates made by the *Danesi Co.*, Rome).

21. *The Same, Restored.* From the facsimile in the edition by *W. Studemund* (Leipzig, 1874).

22. *Justinian and his Ministers* (Ravenna Mosaic). From a photograph of the original in the Basilica of San Vitale at Ravenna.

23. *Justinian's Digest.* From the facsimile of the original MS. in the Laurentian Library at Florence, published in "Justiniani Augusti Digestorum sive Pandectarum Codex Florentinus olim Pisanus phototypice expressus" (Rome, 1902).

24. *Justinian Presiding over the Compilation.* From a photograph of the painting by *Benjamin Constant*, in the Metropolitan Museum of Fine Arts, New York.

25. *The Forum Buildings.* From a photograph of the reconstruction by *E. Becchetti*, of the Royal Academy of Fine Arts, Rome.

26. *The Deserted Forum in the Middle Ages.* From the drawing in *F. Hoffbauer* and *H. Thèdenet*, "Le Forum Romanum", p. 87, plate 5 (Paris, Plon, 1905).

VII. Roman Legal System

Sources of Documents Quoted in Text

a. Twelve Tables. From the translation in *Kocourek* and *Wigmore's* "Evolution of Law Series", vol. I, p. 465 (Boston, Little, Brown & Co., 1915).

b. Lex Julia Municipalis. Revised from the translation in *E. G. Hardy*, "Roman Laws and Charters", p. 151 (Clarendon Press, 1912); the Latin text is in *P. F. Girard*, "Textes de droit romain", 5th ed., 1893, p. 80.

c. Lex Coloniae Genetivae Juliae. From the translation in *E. G. Hardy*, "Three Spanish Charters", p. 23 (Oxford, Clarendon Press, 1915).

d. Genoa Judgment B. C. 100. MS. translation (Latin text in "Corpus Inscriptionum Latinarum", vol. I, plate XX, and p. 453) from the Italian translation in the Catalogue of the Museum of History and Arts at Genoa.

e. Contract to Build a Gateway. From a MS. translation by *O. Floyd Long*, professor of Latin in Northwestern University.

f. Deed of Realty. Translated from the text in *Girard* (cited *supra*), p. 851.

g. Will. Translated from the text in *Girard* (cited *supra*), p. 805.

h. Gibbon. "Decline and Fall", c. XLIV (vol. 5, p. 273, ed. *Smith*, Boston, 1854.)

i. Servius Anecdote. From the Digest, I, 2, 2, 43.

j. Tacitus on Orators. From his "Dialogus", par. 6, transl. *Wm. Peterson* (London, Heinemann, 1914).

k. Cicero's Topics. From the translation in *C. D. Yonge*, "Orations of Marcus Tullius Cicero", vol. IV, p. 460 (London, Bohn, 1856).

l. Apollonius' Trial. From *Philostratus*, "Life of Apollonius of Tyana" book VIII, transl. *Conybeare* (London, Heinemann, 1912).

m. Sophists' Trial. From *Eunapius*, "Lives of the Philosophers", transl. *W. C. Wright*, p. 469 (Loeb Classical Library, 1922).

n. Pomponius. From the Digest, I, 2, 2, 49.

o. Julian's Edict. MS. translation from the text in *Girard* (cited *supra*), p. 137.

p. Court Record A. D. 124. Translated from the text in *Girard* (cited *supra*), p. 899. The military title of this judge was probably only honorary, for Egypt had been subjugated a century before. Cicero on a visit to Greece took with him a military commission.

q. Court Record of A. D. 207. From a MS. translation by *O. Floyd Long*, professor of Latin in Northwestern University, from the text in *Girard* (cited *supra*), p. 907. A facsimile of the original record has been shown *ante*, chap. I (Egypt), plate 11.

r. A Counsellor's Opinion. From a MS. translation by *A. Kocourek*, professor of Law in Northwestern University (text in *Girard*, cited *supra*, p. 621).

s. Passage from Ulpian. From the translation in *C. H. Munro*, Digest XLVII, 2, De Furtis, p. 25 (Cambridge University Press, 1893). But "furtum" has here been translated "conversion".

t. Passage from Quintilian. From the translation by *John Selby Watson*, p. 424 (London, 1856).

u. Passage from Gaius. From the translation in *Edward Poste*, "Elements of Roman Law, by Gaius" (2d ed., 1875). But for C. 1, §8, has been used the correct translation of *Joseph I. Kelly*, in Illinois Law Review, VI, 561.

General References

The materials in English are here readily ascertainable. They may be found cited in the following work:

Chas. P. Sherman, "Roman Law in the Modern World" (Boston, 1917, 3 vols.). To which may be added: *J. Declareuil*, "Rome the Lawgiver" (New York, 1926).